



International Comparative Jurisprudence



RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN ACCORDANCE WITH TURKISH INTERNATIONAL PRIVATE LAW

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Abstract. The main purpose of this study is to present the conditions for the recognition and enforcement of foreign judgments in Turkey under Turkish law, with an emphasis on judicial decisions and a more follows reference to arbitration decisions. Due to the breadth of the subject, for which extensive literature has been developed in Turkish science as well as important jurisprudence, it has been considered appropriate to limit the coverage in this study to presenting the provisions of current Turkish law through its sources – notably the Code of Private International and Procedural Law (MÖHUK) – and the way in which it is interpreted and applied in both theory and Turkish law.

Keywords: international private law, Turkish Code of Private International and Procedural Law (MÖHUK); recognition of foreign judgments; Turkish arbitration decision; principle of reciprocity; public order.

Introduction

The main purpose of this study is to present the conditions for the recognition and enforcement of foreign judgments in Turkey under Turkish law, with an emphasis on judicial decisions. Due to the breadth of the subject, for which extensive literature has been developed in Turkish science as well as important case law, it was considered appropriate to limit the development of this study to the presentation of the provisions of current Turkish law through its sources and the way it is interpreted and applied as apparent from both theory and case law. We will focus on the development of the main Turkish legislation – the Code of Private International and Procedural Law (*MÖHUK*) – and beyond that will confine ourselves to a brief reference to the multilateral international treaties in force in Turkey.

1. Sources of Turkish private international law

The first Turkish legislative act of private international law with reference to the recognition and enforcement of foreign judgments was "The Law of Obligations of Aliens in the Ottoman State"² (*Memaliki Osmaniyyede Bulunan Ecnebilerin Hukuk ve Vezâifi Hakkında Kanunu*) of 23 February 1330 (1914). This was a remnant of the Ottoman Empire that was maintained for decades in the legislation of the modern Turkish State. The law was enacted by the government of Sultan *Mehmed E* following the Ottoman occupation shortly after the end of the Second Balkan War and for the facilitation of foreign nationals who had settled in the Empire's cities or did so later (Çelikel, 2010). This law became obsolete after the adoption of the Turkish Code of Civil Procedure and was abolished

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definitively in 1982 (Çelikel & Erdem, 2016).

After the introduction of the first Turkish Code of Civil Procedure (*Hukuk Usulü Muhakemeleri Kanunu/HUMK*) of 18.08.1927, the recognition and enforcement of foreign judgments was governed by the provisions of articles 537 to 545 of the code. It should be noted that these provisions significantly restricted the possibility of recognition and enforcement of judgments, offering a more prominent example of the complete exclusion of foreign decisions in family law (art. 540 par. 4) (Sakmar, 1982).

The first legislative act of purely private international law in the modern Turkish State was the first Code of Private International and Procedural Law (*MÖHUK*) of 20.05.1982 (Ansary & Schneider, 1990). This included a specific chapter on the recognition and enforcement of both foreign judgments (articles 34 to 42) and, for the first time, foreign arbitration (articles 43 to 45). The introduction of the new Turkish Civil Code in 2001 led to the appointment of a preparatory committee for the drafting of a new Code of Private International and Procedural Law, which replaced the first code in 2007 (Evin & Denton, 2012).

Thus, the general provisions of Turkish law on the recognition and enforcement of foreign judgments and arbitration awards are currently compiled in the Code of Private International and Procedural Law (*MÖHUK*) n. 5718 of 27 November 2007, and particularly in articles 50 to 54 referred to in provisions on international jurisdiction and law applicable to disputes with foreigners (Ansary & Wallace, 2011).

The general provisions of par. 50 et seq. of the Turkish Code of Private International and Procedural Law do not apply where there is either a bilateral agreement with the State from which the judgment originates or even a multilateral convention ratified by that State if it concerns the subject of the foreign decision. The priority of international conventions against the general provisions of the Turkish Code of Private International and Procedural Law stems from the provision in art. 1 par. 2, which states that the provisions of the code are to be applied without prejudice to the international conventions to which the Republic of Turkey is a contracting party. Turkey is party to several international conventions of the Hague Conference and other multilateral conventions³. It has also concluded 24 bilateral conventions⁴, mainly with Arab and Eastern European states, as well as with Turkish-speaking former Soviet republics of Central Asia. However, Turkey has not concluded a bilateral convention with Greece and Cyprus (Nomer, 2013).

2. Recognition and enforcement of foreign judgments

According to the theory of Turkish civil law, foreign judgments that have either not been recognised or do not qualify for recognition, do not in themselves produce *res judicata* within the country. This principle is an expression of the independence of domestic judicial authorities, so that no foreign decision can either be *res judicata* or enforced in the country without the intervention of the Turkish courts. Recognition of a foreign court's judgment therefore means also applying its *res judicata* in Turkey. The boundaries of this principle, both objective and subjective, are determined in accordance with the procedural law of the State of the court that delivered the judgment. The *res judicata* of the Turkish court's decision on recognition cannot therefore be wider than that of the recognised foreign judgment (Nomer, 2008). However, if certain legal effects of the foreign decision are recognised by the foreign law in question but not accepted by that in Turkey, they cannot be included in the decision on recognition.

³Turkey is also party to the following conventions: Convention on Recognition and Enforcement of Decisions concerning the Matrimonial Bond (1975); Convention on Recognition and Enforcement of Decisions concerning Maintenance Allowance Obligations Towards Children (1958); Convention on Recognition and Enforcement of Decisions concerning Maintenance Allowance Obligations (1973); European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children (1980). With all these conventions, de facto reciprocity is also sufficient.

⁴Turkey has also entered into bilateral treaties for the reciprocal recognition and enforcement of foreign judgments and judicial assistance with respect to commercial and civil matters with Albania, Algeria, Austria, Azerbaijan, Bosnia and Herzegovina, Bulgaria, China, Croatia, Georgia, Iran, Iraq, Italy, Kazakhstan, Kyrgyzstan, Lithuania, Macedonia, Moldova, Mongolia, Oman, Poland, Romania, Slovakia, Syria, Tajikistan, Tunisia, Turkish Republic of Northern Cyprus, Turkmenistan, Ukraine and Uzbekistan.

With regard to the enforcement of foreign judgments, the competent court is not confined to the recognition of foreign *res judicata* but, in addition, declares the enforceability in Turkey of the judgment's voting provisions (as long as this is permissible under Turkish law) by ordering their execution by all competent bodies in the Republic of Turkey. In carrying out foreign judgments, extra conditions are therefore required other than those for recognition (Erdem, 2006).

The recognition and enforcement of foreign judgments is currently governed by article 50 et seq. of the Turkish Code of Private International and Procedural Law. Articles 50 to 57 describe the procedure for the enforcement of foreign judgments, and 58 to 59 that for the recognition of judgments by introducing certain specific arrangements and referring to the previous articles on enforcement. Finally, articles 60 to 64 are devoted to the recognition and enforcement of foreign arbitration decisions (Ansary & Basedow, 2011).

The general and specific conditions for the enforcement of foreign judgments also apply for the most part to the recognition procedure, apart from the exceptions introduced by art. 58. For this reason, reference is also made in several cases to recognition issues involved in those judgments, particularly in matters of finality or public order⁵. For more specific arrangements in accordance with the first paragraph of art. 50, judgments of foreign courts in civil cases that have become final under the law of that State require a decision of enforceability to be applied by the competent Turkish court for them to be enforceable in Turkey (Çelikel & Erdem, 2012).

The three basic conditions set out in that provision are: a) to be a judgment given by a foreign court in civil matters; b) that it has become final in accordance with the law of the issuing State; and c) that its enforceability is declared by a relevant decision of the competent Turkish court.

The first condition refers to the type of decision that can be identified. The reference to "civil cases" (*hukuk davalarına ilişkin*) has until recently led to the interpretation that the provision concerns only judgments handed down by civil courts, thus ruling out criminal or administrative court rulings.

An exception, in accordance with art. 50 par. 2, is criminal convictions of foreign courts that contain provisions on civil rights (*kişisel haklarla ilgili hükümler*). These are cases in which criminal judgments are handed down under the requirements of private law, in judgments of criminal courts in labour law cases. This special rule of law has led to a new interpretation of art. 50 that has now been fully endorsed by Turkish theory. According to this, as a condition for the application of that article, the type of court that delivered the judgment is not examined, but the type of dispute that stems from private law relations (Tekinalp, Nomer & Odman Boztosun, 2012). As a result, it has been argued that even a decision by a foreign administrative court that obliges a company to pay compensation for the breach of a contractual obligation can be recognised and enforced in Turkey (Çelikel, 2010). In contrast, as a purely administrative, it has been judged by Turkish case law decisions of administrative courts dealing with unfair competition (cartels) and labour law cases not related to private claims, such as social security cases (Çelikel, 2010).

Judgments on whether or not something is a matter of private law is up to the Turkish court that has jurisdiction to rule on enforceability, with this considered to be in accordance with Turkish law (Çelikel, 2010). This judgment is mandatory for the court and is made of its own motion when seeking recognition and enforcement of a foreign decision.

⁵According to the Assembly of Civil Chambers of Cassation, decision no. E. 2011/13-568 K. 2012/47 T. 8.2.2012: "(...) Turkish public policy defined as a whole of the institutions and rules that determines the basic structure and protects the interest of political, social, financial, moral and legal perspectives of a society in a specific period of time (...)". The Board of the Unification of Case Laws of the Cassation, decision no. E. 2010/1 K. 2012/1 T. 10.2.2012, emphasises a fundamental and important element of the violation of a public order: "(...) not every violation of the mandatory legal rules cannot be classified as violation of the public policy (...)". Otherwise, the courts could break a basic rule of arbitral principle: the prohibition against judicial review of the merits of an arbitral decision (*révision au fond*) means that when determining the enforceability of arbitral awards, the court cannot act as an appellate court and can review *de novo*. The court cannot review the merits of the award based on public policy arguments.

It is also self-evident that recognition and enforcement cannot be the subject of a foreign court ruling on the recognition and enforcement of a judicial or arbitration award by a third State (Çelikel, 2010). In addition, it does not signify recognition of a foreign decision that by its very nature cannot be recognised, such as the decision of a foreign court declaring bankruptcy. On the other hand, it is acceptable to recognise (but not execute) the decision of a foreign court that rejects a plaintiff's claim, as this establishes the non-existence of the claim against the defendant (Nomer, 2008).

It has also been ruled that a foreign judgment cannot be enforced after expiry of the limitation period determined by the law of the State in which the judgment was delivered and therefore not apply to the 10-year period prescribed by Turkish law (Şanlı, 2011). Furthermore, foreign orders for payment may not be executed, even if they have become final and enforceable under the law of the place where they were issued, as these are not judicial decisions as explicitly required by law (Şanlı, 2011). It goes without saying that the Turkish Code of Private International and Procedural Law is not the subject of recognition and enforcement within the meaning of the law of foreign notarial documents and administrative acts of foreign authorities (Ertaş, 1987).

With regard to the notion of "the court" (*mahkeme*), it has been held that the authority that issued the judgment to be recognised must be recognised as a judicial or even a decision to bring legal effects similar to a judgment under the law of that State and, at the same time, as such by Turkish law (Nomer, 2013). This means that, for example, a divorce decree issued by the City of Copenhagen cannot be recognised because this is not a body that meets the characteristics of a judicial authority⁶. A special exception is, however, provided under art. 30 par. 2 of the "civil registry services act" (*Nüfus Hizmetleri Kanunu*)⁷, which expressly defines the recognition and enforcement of adoption decisions issued by foreign administrative bodies⁸ provided that they are final or produce definitive results in accordance with the domestic law of the State (Nomer, 2013).

It has also been ruled that divorce diplomatic missions or consular orders, as well as notarial deeds of marriage, do not fall within the scope of art. 50 (Ruhî, 2009)⁹. In contrast with cases of marriage annulment under Muslim law through a unilateral husband-to-husband declaration (triple *talaq*) (Hefner, 2011), it has been maintained that if a foreign court has issued a decree recognising the termination of a marriage in this way, it is possible to recognise it because the rules of Turkish public order are not violated (Çelikel, 2010 & Nomer, 2013)¹⁰.

Such a decision being issued by a court known as "administrative" does not preclude recognition for that reason alone, given that the nature of the case, which in this instance is purely private, is being investigated¹¹. For example, according to the Turkish Code of Private International and Procedural Law, the decision of a disciplinary body of a foreign sports federation that imposes a disciplinary punishment such as an exclusion or fine on an athlete, as the nature of that decision relates more to administrative than private law (Erten, 2007).

3. Final judgments

Art. 50 par. 1 stipulates that a foreign decision for which recognition and enforcement are sought must be final (*kesinleşmiş*). The classification of a judgment as final or not is always made in accordance with the law of the State in which it was issued (Sakmar, Ekşi & Yılmaz, 2001)¹². In any event, a judgment being enforceable but not

⁶Y. 2 HD, 13.04.1995 E.3612/K.4567 (*Kazancı Hukuk Otomasyonu*).

⁷Law no. 5490 of 25-4-2006.

⁸See also the 29 April 2017, Article 27/A which has been added to Law on Civil Registry Services by Statutory Decree No: 690 issued under the State of Emergency. The Article regulates registration of divorce judgments produced by foreign judicial or administrative authorities to relevant civil registries.

⁹See also: Y. 2. HD 12.07.2002 E.8254/K.9339.

¹⁰With reference to a judgment of the Chalcedon Court of First Instance: Kadıköy 2.Asl. H.M. 07.02.1991, in *İstanbul Barosu Dergisi*, 1991, pp. 501ss.

¹¹Y. E. 1974/105, K. 1974/297 (*Kazancı Hukuk Otomasyonu*).

¹²Y. 14. HD 30.09.1985 E.5537/K.7505, in *Yargıtay Kararları Dergisi*, 1986, pp. 39-40 and *Ankara Asl. H.M.* 19.09.1991. The above author states that: "(...) which states that it is necessary to investigate when a decision becomes final under foreign procedural law, and proof is the

final under the law of an issuing State (for example, in provisional enforceable judgments) is not sufficient for recognising or refusing recognition of a French inheritance certificate issued by a notary because it was not a court decision (Çelikel, 2010; Ruhi, 2009; Nomer, 2013)¹³. A question arises with regard to those decisions that produce a so-called "typical" (*maddi*) but not "substantive" (*şekli*) *res judicata*¹⁴. These are primarily voluntary cases that can be reformed if new information emerges later (Çelikel, 2010). In such cases, both theory and case law¹⁵ are supported by the fact that it is not possible to recognise and enforce these judgments because of doubt arising from the lack of effective *res judicata*. However, the exclusion of recognition and enforcement only on the grounds that they lack "substantive" *res judicata* has been criticised by some of the theory on the basis that this distinction is purely theoretical and does not clearly follow from law. This view is supported by the fact that in legislation applicable to the recognition and enforcement of decisions up to 1982, art. 537 of the then Turkish Code of Civil Procedure required the existence of a "final decision" (*kesin hüküm teşkil etmiş bulunması*)¹⁶.

However, derogations to the condition of termination apply to judgments of the courts of states with which Turkey has bilateral agreements to facilitate the mutual enforcement of judgments. For example, in accordance with relevant bilateral conventions signed with Tunisia and Italy, the recognition and enforcement of a foreign judgment is permissible, irrespective of the exercise of any extraordinary remedies (*olağan kanun yolları*) such as an appeal, provided that the decision is in accordance with the law of the executing State¹⁷.

In addition, provisions that facilitate the recognition of foreign judgments exist in multilateral conventions to which Turkey is a contracting party. Thus, for example, the Hague Convention of 15 April concerning the recognition and enforcement of decisions relating to maintenance obligations towards children (Duncan, 2008, & Liakopoulos, 2018) is dependent on appeals characterised by Turkish theory as "tactical" appeals. In contrast, an "extraordinary" appeal (*yargılamanın yenilmesi*) (Basedow, Rühl, Ferrari & De Miguel Asensio, 2017) attacks final judgments when there is a reason for rejoinder. For more information on the finality of Turkish procedural law of 1958 (Pekcanitez, Altay & Özkeç, 2008) on the recognition and enforcement of judgments concerning child-raising obligations¹⁸, art. 2 par. 3 provides for the recognition of provisional enforcement orders or judgments that order interim measures relating to child nutrition even if legal remedies are pending (Nomer, 2013)¹⁹.

relevant stamp on the decision given by the foreign judicial authorities (...)"

¹³A contrary opinion is offered by Ruhi, A.C., criticising this issue in observing the unfair effects of excluding the execution of interim judgments – for example, in maintenance cases awarded by provisional decision in divorce proceedings or in paternity recognition when issued in countries that are not party to the relevant Hague Conventions.

¹⁴On this distinction, which is identical to that in Greek procedural theory, see. Y. 16. HD 15.07.1991 E.12819/K.10931, in Yargıtay Kararları Dergisi, 1992, pp. 741-742.

¹⁵Plenary Civil Divisions of Cassation Court (Y. HGK) 28.12.1994, E. 2-625/K. 905 (*Kazancı Hukuk Otomasyonu*).

¹⁶At this point, it is useful to clarify the following: "definitive" (*nihai*) decisions in Turkey are decisions of tribunals of first instance issued following the last debate before them (since, as a rule, a court of first instance needs more than one debate until it makes its final decision). The word "final" is interpreted as meaning that the merits of the case cannot be re-examined, given that there are no secondary courts of substance in Turkey (although these are provided under article 341 of the Turkish Code of Civil Procedure (*HMK*), but have not yet been established). Decisions of first degree are only offensive with an appeal (*temyiz*) to the Cassation Court (*Yargıtay*). As "final" (*kesinleşmiş*) decisions are not judgments of courts of first instance for which either the time limit for appealing before the Cassation Court has expired, either have been appealed and the Court of Appeal has issued an appeal or validated it. We see, therefore, that court: *finesse is ve nihai olması*. Thus, the deletion of the reference to a "final decision", both in the old code of 1982 and the new Turkish Code of Private International and Procedural Law, was considered to have been made precisely because the legislator was interested in the "formal", irrespective of whether the decision could be reformed for substantive reasons. Aside from this, we believe that the recognition and enforcement of this decision is acceptable, given that the hypothetical case of their reform in the future can come to recognise the new decision in Turkey. Moreover, this is not forbidden because, as we have seen above, the *res judicata* of the Turkish recognition/enforcement decision cannot be wider than the *res judicata* of the foreign decision in its State of origin, and that *res judicata* has not prevented its reform in that State.

¹⁷See also article 2c of the "Convention between the Republic of Turkey and the Republic of Tunisia on the Recognition and Enforcement of Judgments in Civil and Commercial Matters" ratified by the Turkish National Assembly on 17.7.1984 and article 19 par. 4 of the "Convention between the Republic of Turkey and the Kingdom of Italy on judicial protection, mutual assistance of judicial authorities in civil and criminal matters and the enforcement of judgments", ratified by the Turkish National Assembly on 16 February 1929.

¹⁸This was ratified by the Turkish National Assembly on 25.6.1973, but has not been ratified by Greece; see also article 4 of the "Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations", ratified by Turkey on 22.11.1982 and by Greece on 13.11.2003.

¹⁹The term used in the legislation is *tenfiz kararı*, which translates verbatim into Greek as "recognition decision". However, the theory of

However, such interim measures may not be enforced in the other State unless the law of that State provides for their execution²⁰.

Termination or selectivity under the law of the State in which the decision was made must be expressly stated in an official document produced by the person concerned to the competent court (art. 53 par. 2) (Krüger & Nomer-Ertan, 2008).

4. Executory declarations of enforceability

Similarly, the execution of a foreign court ruling within Turkey is not possible unless a decision of enforceability (*tenfiz kararı*) is first issued by the competent Turkish court. Under this decision, it will first be determined whether the first two basic conditions are met: either it is a matter of civil litigation or it is final (Çelikel, 2010).

Of course, for a foreign judgment to be recognised and enforced, it must in principle be enforceable under the law of the State in which it was issued²¹. However, since the decision is not based merely on a finding of enforceability under foreign judgment, but a decision of a Turkish court investigating the existence of the relevant conditions required by law, its execution in Turkey is in accordance with the provisions of domestic law and only if they allow it (Nomer, 2013).

As is the case today in almost all European countries, a judge's power to recognise and declare the enforceability of a judgment does not extend to the substance of the case, meaning they cannot rejudge the legal or substantive validity of the requests accepted²². By contrast, until the introduction of the first Turkish Code of Private International and Procedural Law in 1982, art. 540 of the Turkish Code of Civil Procedure stipulated that "(...) the Court of First Instance shall, at its sole discretion, issue a declaration of enforceability (...)" (Tekinalp, Nomer & Ayse Odman Boztosun, 2012). That left the judge the opportunity to recognise the foreign decision at their discretion, since there were no specific conditions for recognition (Koral, 1988).

The court of first instance is competent for the recognition and enforcement of foreign judgments (art. 51 par. 1) (*asliye mahkemesi*). In some cases, depending on the subject matter of the dispute (Çelikel, 2010), the competent court may be a commercial court (*ticaret mahkemesi*) (Çelikel, 2010 & Kuru, 2001, and against: Şanlı, 1993), labor court²³ (*iş mahkemesi*), or family court (*aile mahkemesi*)²⁴ in areas where they are located.

Local jurisdiction is defined in paragraph 2 of article 51, whereby the court in the defendant's domicile is competent to execute and if that person is not domiciled by the court of their habitual residence. If the defendant is not domiciled or habitually resident in Turkey, recognition and enforcement may be requested by the competent court of Ankara, Istanbul or Smyrna. On the other hand, the existence of a defendant's property in some part of Turkey has no bearing on the definition of territorial jurisdiction (Nomer, 1984).

5. (follows) Legalisation, requests and required documents

The right to seek enforcement of a foreign judgment has "any person having a legitimate interest in its execution" (art. 52 par. 1 of *MÖHUK*) (Eksi, 2007)²⁵. It is noteworthy that this was wording introduced in the Turkish Code

Turkish private international law mentions this term in conjunction with the Latin *exequatur*, which translated into Greek is "declaration of enforceability".

²⁰Y HGK E.2011/13-568 K.2012/47 T.08.02.2012.

²¹Thus, if according to the law of the State of origin of the decision, the limitation period has been reached, it can no longer be enforced within that State and therefore can not even be recognized or enforced in Turkey.

²²Y. 2. HD 24.04.2009, in İstanbul Barosu Dergisi, 2003, pp. 1012-1014.

²³Y. 9. HD 09.12.1991, in İş Hukuku Dergisi, 1992, pp. 151.

²⁴Y. 2. HD 08.07.2008, E.6987/K.10100, in Yasa Hukuk Dergisi, 2008, 1923 and Y. 2. HD 25.03.2009 E.18049/K.5516 R.G. 05.06.2009, 27249.

²⁵For the content of the legitimate interest in these cases, see. Y. 2. HD 19.12.1994, E.11220/K. 12667.

of Private International and Procedural Law of 2007 to facilitate persons who were not parties abroad but who acquired a legitimate interest in its recognition, as is the case particularly in matters of inheritance, maintenance and custody (Nomer, 2013)²⁶. The person concerned must apply to the competent court providing: a) details of the applicant and the defendants or their representatives; b) the State of origin of the judgment, the name of the court, and the number and date of the judgment with a brief summary; and c) only the operative part, clarification of which is requested (art. 53 par. 1). The original or a copy of the decision certified by the issuing court and a certified translation must be attached to the application, as well as an official document of the foreign authorities providing the final judgment and its translation (art. 53 par. 2). A special law was adopted in 2004 (Law No. 5070) by which an electronic signature has the same legal effect as a written signature, allowing for the conclusion of arbitration agreements by email. It is worth noting that the corresponding wording in the previous law was "the original of the decision certified by the authorities in that country, and a certified translation is annexed to the request" (Nomer, 2013, & Clavel, 2018). This caused problems in many cases because enforcement requests were rejected on the grounds that most courts provided a formal copy rather than the original of the decision (Çelikel, 2010)²⁷.

6. (follows) Conditions to be met under foreign decisions

In addition to the essential requirements of article 50 for the enforcement of a foreign judgment, article 54 sets out four further conditions that must be met for a decision to be enforceable. It states that the competent court adopts a declaration of enforceability if: a) there is a contract between the Republic of Turkey and the State that issued the decision based on the principle of reciprocity, or a provision of law permitting the enforcement of judgments handed down by the Turkish courts or when they are carried out in that State; b) the judgment in question concerns an issue that did not fall within the exclusive jurisdiction of the Turkish courts and the judgment was not delivered by a foreign court that itself recognised as competent, despite the fact that it had no real connection with the subject and the parties provided that the defendant raised an objection; c) the decision is clearly not contrary to public policy; d) the defendant was not properly summoned in accordance with the procedural rules of the tribunal and was either not represented in that court or was tried in default of the law of that State; and furthermore, that they did not apply to the Turkish courts for enforceability based on one of the points cited above (Damar, 2015).

7. (follows) The principle of reciprocity

In art. 54 par. 1, referring to the principle of reciprocity²⁸, the existence of either a contract recognising the execution of foreign judgments or relevant legislation in the State of origin permitting the recognition of corresponding judgments given by Turkish courts. This provision was originally introduced by the first Turkish Code of Private International and Procedural Law of 1982. So far, the relevant provisions of the Turkish Code of Civil Procedure allowed the recognition and enforcement of only those decisions originating from countries with which Turkey had concluded a contract – which numbered few. The new provision has rightly said that apart from the policy on this issue in 2009, Turkey was finally condemned unanimously by the European Court of Human Rights in *Fokas v. Turkey* of 29 September 2009 – something that ultimately Turkey did not even appeal (Geiger, 2015).

²⁶With reference to: Y. 2. HD 21.12.2009 E.9678/K.22090 and Y. 2. HD 20.01.2010 E.19620/K.1034, in Resmi Kararlar Dergisi, 2010, pp. 802ss. See also: Y. 2. HD 27.03.2008 E.20375/K.4214 and Y. 2. HD 25.06.2008 E.8629/K.9345 (*Kazancı Hukuk Otomasyonu*).

²⁷Where there are also references to the relevant decision of the Turkish Court of Cassation (Y. 1HD 22.6.1987, Y. 4 HD 18.3.1993, Y. 2 HD 5.7.1994).

²⁸The principle of reciprocity also applies to other provisions of Turkish law, such as in article 58 of act no. 2644 of 22.12.1934 "On Land Registers" (*Tapu Kanunu*), according to which (until its last amendment on 3.5.2012) foreign natural persons could acquire real rights in Turkey under the condition of reciprocity. Regarding reciprocity with Greece, the Turkish Court of Cassation had considered that Turkish nationals were able to acquire real estate in Greece, but according to Greek law (as in force until 2011), 55% of Greek territory was classified as border regions, and foreigners were deprived of the opportunity to acquire real rights in these areas either by a living act due to inheritance (which was, however, unheard of inheritance). It was therefore considered that there was no reciprocity in the acquisition of real estate in Turkey by a Greek citizen due to inheritance (Y.2 HD 27.06.2002 E.7515/K.8605 and Y.2. HD 04.06.2002 E.6014/K.8387-*Kazancı Hukuk Otomasyonu*).

With regard to the necessity or otherwise of the principle of reciprocity, two aspects have been supported in Turkish theory. There are theoreticians who claim that there should be no requirement for recognition of a foreign decision, because this is a political element that should not affect law as well (Sakmar, 1982, & Koral, 1982). Furthermore, the requirement for reciprocity and the difficulty of its finding often create an obstacle that is considered unjustified. This is because the remaining conditions (b, c, ç) of that article are believed to be sufficient for protecting the interests of Turkey and Turkish citizens in particular. In contrast, they end up being affected when they themselves are able to pass a positive decision to a foreign court, then they are unable to execute it in Turkey (Nomer, 1998 and 2008).

On the other hand, there are those who defend the principle of reciprocity as an element of the sovereignty of the Turkish State and as a means of pressing for the recognition of judgments handed down by Turkish judicial authorities from other states. According to these writers, a *de jure* or *de facto* refusal to execute them constitutes a legitimate reason for respective exclusion from the execution of the decisions of those states in Turkish territory (Çelikel, 2010 & Erdoğan, 1977). Proponents of reciprocity point out that after the addition of legal or real reciprocity to the law as a disjunctive condition, the recognition and enforcement of the decisions of most of the world's states are achieved (Çelikel, 2010).

In relation to the verification of *de jure* or *de facto* reciprocity in the law of the other State, a problem often arises: the law of each State requires reciprocity from the other, with the result that one expects the other to apply the principle first (Nomer, 2008). However, it has been determined by jurisprudence that the judgment of a State whose law states that "it is not possible to recognise and execute a foreign judgment if the State in which the judgment is delivered does not recognise the principle of reciprocity" (Oğurlu & Gürpınar, 2010), as that provision permits *de jure* the execution of Turkish judicial decisions in that State²⁹. In any case, however, the search for reciprocity is necessary either for acceptance or rejection of the application for a declaration of enforceability, and Turkey's Court of Cassation has set aside a lower court decision on the grounds that "(...) as regards the issue of reciprocity, the refusal of the relevant application without the Court making any inquiry into reciprocity with the other State is contrary to the provisions of law (...) "³⁰.

An issue also arises when the law of the other State permits the execution of Turkish court decisions, but gives the judge the opportunity to examine the merits of the case to verify whether the claim is well founded. In this case, it may be argued that there can be no legal reciprocity because foreign law imposes stricter conditions for execution than that of Turkey. This means that real reciprocity must be investigated if, in practice, applications for the recognition of Turkish court judgments that otherwise fulfil the requirements of law are admissible (Çelikel, 2010).

It is also important to note the *de facto* application of reciprocity with regard to countries with which Turkey has bilateral or multilateral agreements. Although Turkey has concluded bilateral agreements with 24 countries, if it is found that despite the existence of a treaty in this state, Turkish decisions are not executed without any other legitimate reason, whereas national decisions with equivalent content present an obstacle to the execution of the decisions of the states in Turkey due to a lack of reciprocity (Çelikel, 2010).

8. The prohibition of the exclusive jurisdiction of Turkish courts and the non-discharge of jurisdiction

The second condition of article 54 has two strands regarding two different issues relating to a judgment to be enforced: a) not to have been delivered on a question falling within the exclusive jurisdiction of a Turkish court;

²⁹The present case concerned the execution of a judgment made in Zurich, Switzerland, and for the purpose of establishing reciprocity, the law of the relevant canton was examined, with that considered compatible with article 38 of the previous code (and already article 54 of the new code). Y. 1 HD 06.11.1985, see against Y. HD 13 13.06.1990, but which was subsequently annulled by the Plenary Civil Divisions of the Court of Cassation, which held that: "(...) if foreign law generally permits the execution of foreign judgments, subject to reciprocity by the other State, it must be accepted that the conditions laid down in article 38 relating to the existence of reciprocity are fulfilled (...)". Y. HGK 13.06.1990, in Yargıtay Kararları Dergisi, 1990, 1282.

³⁰Y. 11. HD 30.01.2009 E.1284/K.980, in Banka ve Ticaret Hukuku Dergisi, 2009, pp. 276, as well as Y. 2 HD 22.11.1984 E.8148/K.9647, Yargıtay Kararları Dergisi, 1985, pp. 338 and Y. 2. HD 14.05.1996 E. 2955/K.5085 (*Kazancı Hukuk Otomasyonu*).

and b) not to have been issued in excess of jurisdiction of the court that issued it – in other words, that there is an adequate link with the case or the parties involved and that the defendant has challenged the jurisdiction of the court before it is issued.

Regarding the issue of "exclusive jurisdiction" (*münhasir yetkisi*) (Çelikel & Erdem, 2012), it is clearly stipulated that a foreign decision cannot be executed if its subject matter was exclusively under the jurisdiction of a Turkish court (Derya Tarman, 2017). Assistance of the element of exclusive competence is judged in accordance with Turkish law. Of course, the foreign judge could hardly have been aware of these provisions of Turkish law during the case, but that limitation is imposed by the Turkish legal order to ensure that certain rights are reserved for a Turkish court (Çelikel, 2010). It is therefore irrelevant whether, under the law of the court of the tribunal, it was responsible for the disputed disagreements (Nomer, 2013). The determination of the jurisdiction of Turkish courts is made both under articles in the Turkish Code of Private International and Procedural Law and by reference to the provisions of the jurisdiction of Turkish courts found, in particular, in the Turkish Code of Civil Procedure and other specific legislation (see article 40 of the Turkish Code of Private International and Procedural Law).

Thus, article 12 of the new Turkish Code of Civil Procedure is primarily a matter of jurisdiction for proceedings concerning rights in rem or changes in ownership of immovable property in Turkey for which the district court has jurisdiction. This category includes legal treatment when it concerns real estate (*miras sebebi ile istihkak davası*). It has therefore been ruled that a foreign decision concerning the inheritance of immovable property located in Turkey³¹ cannot be enforced, as this court has exclusive jurisdiction with regard to the last domicile of the deceased and if that person was not in Turkey, then is the district court³² (see articles 576 of the Turkish Civil Code and 43 of the Turkish Code of Private International and Procedural Law). Similarly, in a divorce lawsuit involving the distribution of common assets, if the property is located in Turkey, it is not the execution of the decision to change the ownership of the property (Şanlı, 1986)³³, whereas the part of the decision declaring the marriage's termination is recognised³⁴. On the other hand, the recognition of a divorce decision by a foreign court to which a joint agreement of the spouses for the distribution of common property in Turkey was annexed (Örücü, 2007) on the grounds that the subject of the proceedings was not a change in any real right that was transferred not after the decision but due to the common agreement³⁵.

Another issue considered by Turkish case law to be under the exclusive jurisdiction of the country's courts is the question of the appointment of a legal counsel, as opposed to the declaration of a person in court, which is deemed not to fall within that exclusive jurisdiction. The reason for this is based on art. 10 par. 3 of the Turkish Code of Private International and Procedural Law, according to which "all matters relating to underwriting (*vesayet*) or judicial assistance (*kısıtlılık*), other than the grounds for their declaration or termination, and those of tutelage on the property of the stranger (*kayyımlik*) are governed by Turkish law" (Tekinalp, Nomer & Ayse Odman Boztosun, 2012). Pursuant to articles 411 and 419 of the Turkish Civil Code (Yilmaz, 2013), the appointment of the co-defendant and supervision of legal assistance are to be made by the court in the place of residence of the assisting party; meanwhile, article 462 states that for the acts referred to in the article, authorisation of that court is required (Akif Aydin, 2010).

Thus, it has recently been decided³⁶ that a foreign decision on legal assistance cannot be recognized in Turkey, as the reference in art. 10 par. 3 to mandatory application of Turkish law was considered to include not only substantive but also procedural law. In support of the explanatory statement, it is argued that for each act of support referred to in article 462 of the Turkish Civil Code, a new decision should be issued by the foreign court and then

³¹See the decision of the Turkish Invalidity Division declaring that the application for recognition of a judgment given by the Court of First Instance in Rhodes concerning the right of inheritance over property in Turkey was rejected, on the grounds that Turkish courts have exclusive jurisdiction over decisions concerning property rights in Turkey: Y. 2. HD 10.02.1986 YHD 1987,1328.

³²Y. 2. HD 22..06.1990 E.6373/ K.6410 and Y. 2. HD 16.10.2009, in Yargıtay Kararları Dergisi, 2010, pp. 1023ss.

³³Bodrum Asl. H.M. 12.04.1985 E.267/K.109 with remarks of the cited author.

³⁴Y. 2. HD 25.01.1996, in Yargıtay Kararları Dergisi, 1996, pp. 845ss.

³⁵Y. 2. HD 06.12.1994 E. 9963/K.12007 (*Kazancı Hukuk Otomasyonu*).

³⁶Plenary civil divisions of the Cassation Court (Y. HGK) 08.07.2009 E.255/K.527, in Yargıtay Kararları Dergisi, 2010, pp. 998ss.

the procedure for its recognition in Turkey should be followed. However, both this "practical" reflection of the Turkish Court of Cassation and the interpretation for the application of art. 10 par. 3 are anything but a legal basis. In our opinion, this was rightly criticised by a minority view in the judgment supporting the recognition of the foreign one, considering art. 10 par. 3 as a rule that simply indicates the applicable law and not the basis for exclusive jurisdiction (Şanlı, Esen & Ataman-Figameşe, 2014).

In contrast, there is no exclusive jurisdiction among Turkish courts to resolve marriage by divorce³⁷. This means that recognition of a foreign divorce decree is not impeded even if both the last joint residence of the spouses³⁸ and the defendant's domicile are in Turkey (Akici & Göyayla, 2010).

The same limitation also applies to disputes arising from certain contracts for which legislature has reserved greater protection to a place it considers economically weak (Akici & Göyayla, 2010). In particular, articles 44, 45 and 46 of the Turkish Code of Private International and Procedural Law establish exclusive jurisdiction in Turkish labour, consumer and insurance disputes where the defendant is the employee, consumer or person insured, respectively (Nomer, 2008). For these contracts, a possible conferral of jurisdiction by virtue of a special clause is, in accordance with art. 47 par. 2, void in favour of the weaker party. This confirms the absolute nature of exclusive jurisdiction in favour of those persons (Çelikel, 2010).

In labour disputes, article 44 of the Turkish Code of Private International and Procedural Law provides that in disputes arising from an individual employment contract or employment relationship, if the place where the normal work is provided is in Turkey, the court of that place is competent. According to case law, this competence of the Turkish courts is exclusive and any other foundation of jurisdiction is void in favour of the employee. It follows that a foreign judgment given in a labour dispute against a worker who resident and habitually worked in Turkey cannot be carried out in Turkey³⁹, whereas a foreign judgment may be enforced on a worker's claim against an employer for work done in Turkey⁴⁰.

Accordingly, in consumer contracts, a foreign judgment against the consumer (Ekşi, 1996) cannot be executed if the consumer had their habitual residence in Turkey, because the court in the place of their habitual residence has exclusive jurisdiction under Turkish law (art. 45 of the Turkish Code of Private International and Procedural Law). In Turkish theory, there has been reflection on the extent of this restriction, in which cases exclusive jurisdiction is deemed to exist (Güngör, 2000), and also the probability of such prohibition in cases where provisions applied by the foreign court have been more favourable than those under Turkish law and therefore do not affect consumer protection (Nomer, 2013). In our view, it can be argued as being a contradiction that court proceedings in a foreign country are themselves a barrier to consumers, given that they are charged with both extra costs and practical difficulties (such as translation of documents and failure to produce witnesses) that may deprive them of the opportunity for a proper defence.

With regard to insurance contracts, article 46 of the Turkish Code of Private International and Procedural Law provides that courts in the place of residence are exclusively competent for actions in relation to the insurer (*sigorta ettiren*), the insured person (*sigortalı*), or the beneficiary of the insurance (*lehdar*) or habitual residence of such a person if they are in Turkey. Again, however, the restriction on the enforcement of foreign judgments is applicable

³⁷The Turkish government has introduced a bill numbered 1/698 and dated 01.04.2016 concerning Turkey's accession to the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance ("Hague Convention"), signed by the Prime Minister and all relevant ministers.

³⁸The Turkish government has introduced a bill numbered 1/697 and dated 30.03.2016 concerning Turkey's accession to the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children ("Hague Convention"), signed by the Prime Minister and all ministers. In particular: "(...) the Government bill regarding the approval of the ratification of the Hague Convention is referred to the Committee on Foreign Relations as a primary committee which shall go through the law making process. If enacted, Turkey's accession to the Convention will be an important step forward in the area of Turkish family law in terms of facilitating the protection of children in international situations, avoiding conflicts between multiple jurisdictions, applicable law and recognition and enforcement of measures for the protection of children (...)"

³⁹Y. HGK 05.06.1998, E12-287/K.325 (*Kazancı Hukuk Otomasyonu*).

⁴⁰Y. 9. HD 09.12.1991, in *İş Hukuku Dergisi*, 1992, pp. 150ss.

only to those persons and not the insurer⁴¹. In addition, the exclusive jurisdiction of the Turkish courts has been deemed to have introduced article 10 of the Aliens of Societes Anonymes and Capital Companies Act⁴², under which a foreign company with a branch in Turkey can sue for any dispute (whether related to the branch) exclusively in the courts of the location where the branch is established. That exclusivity was, however, applicable only to third parties that were dealing with the non-resident company. In other words, foreign insurance companies could not claim their insured persons with respect to disputes arising from contracts in which extradition of a foreign court had been agreed, since case law considered there to be exclusive jurisdiction of the courts of the branch in Turkey. In addition, they could not plead lack of jurisdiction or local lack of jurisdiction in actions brought against them at the place of the branch – even when, as mentioned, the dispute was irrelevant to the activity of the branch in Turkey (Sevig, 2000).

On the other hand, it was permissible to bring an action in a foreign court when the company was a defendant (Çelikel, 2010). However, following the abolition of this law from 01.07.2012, the courts in the place of establishment of the branch of a foreign company have had jurisdiction only for disputes arising out of the branch activity. It should also be considered that even for these disputes, there is no longer any exclusivity in the jurisdiction of that court and, by extension, exclusive jurisdiction among the Turkish courts (Süral, 2012). Moreover, given that the reason for Turkish case law being based on the exclusive competence cited above was for the protection of the foreign company's customers (Esen, 2002), we consider that protection is sufficient following the addition of article 45 on consumer protection to the Turkish Code of Private International and Procedural Law. We also consider that any continued acceptance of the above exclusive jurisdiction constitutes a direct discrimination against foreign companies.

Lastly, it has been argued in theory (*rectius*, doctrine and jurisprudence) that the bases of exclusive jurisdiction are founded on reference to domestic law relating to industrial and intellectual property issues enshrined in Turkey. In particular, this relates to disputes arising with a claimant who appears to be the party to the right, either the courts of the place of residence of the beneficial owner of the courts of the place where the breach of the protected rights or the effects of the breach occurred⁴³. In the event that the plaintiff-beneficiary does not reside in Turkey, courts in the city where the registered rights have been enforced are considered the competent bodies. It is therefore argued that, by their very nature, the bases for exclusive jurisdiction of the Turkish courts laid down by the relevant law constitute respectively the bases for exclusive jurisdiction, thereby preventing the recognition of foreign decisions in relation to those matters (Esen, 2002).

9. (follows) Exorbitant jurisdiction

The second part of paragraph (b) of article 54 concerns so-called "over-jurisdiction" (*aşırı yetki*), as known in particular by the English term "exorbitant jurisdiction". In other words, there is another negative condition that can impede the enforcement of a judgment – namely, when: i) a tribunal wrongly held that it had jurisdiction, although it had no real connection with the subject matter of the dispute and the parties; and ii) the defendant disputed the jurisdiction of the court with a claim in front of them.

This condition was added for the first time to the Turkish Code of Private International and Procedural Law. Until then, the exceeding international jurisdiction of the foreign court was treated by the Turkish courts in opposition to the Turkish public order (Nomer, 2013)⁴⁴. Starting from the principle of the natural judge, the *ratio legis* of this

⁴¹Y. 11. HD 19.06.1997, E.3609/K.5636, in Yasa Hukuk Dergisi, 1998, pp. 80ss.

⁴²See: *O "Ecnebi Anonim ve Sermeyesi Paylara Bölünmüş Şirketler Ecnebi Sigorta Şirketleri Hakkında Kanunu Muvakkat"* of the year 1914, a residual of Ottoman legislation, which was established with the entry into force of the new Turkish Commercial Code (CCT) on 01.07.2012.

⁴³See also article 137 of Legislative Decree 551/1995 on the Protection of Patents (*PatKHK*), article 49 of Legislative Decree 554/1995 on the Protection of Industrial Designs (*EndKHK*), article 25 of Legislative Decree 555/1995 on the Protection of Geographical Indications (*CoğKHK*) and article 63 of Legislative Decree 556/1995 on Trademark Protection (*MarKHK*).

⁴⁴That overstepping was considered to be a violation of the fundamental principles of Turkish law, as the case law violated article 36 of the Turkish Constitution and article 6 of the ECHR in ensuring a fair trial.

arrangement is based on the logic that the choice of a court irrelevant to the trial may conceal the plaintiff's intention to restrict the judge's access to evidence and eventually the opportunity for the adversary to defend their interests.

Thus, according to the theory of Turkish law, some of the principles applicable to the procedural law of certain American states such as "in-state service of process" and, in particular, "long-arm statutes" (Nomer, 2013) are examples of exorbitant jurisdiction in accordance with Turkish law (Şanlı, 2011). A decision by a court that has recognised itself as competent for a decision based on one of the above principles without any real link to the case cannot be executed in Turkey as contrary to Turkish law (Nomer, 2013). In any case, failure by a defendant to propose that the court is not competent in the course of proceedings will remedy the impediment of the law on recognition of the decision, and the objection must necessarily indicate which court actually has jurisdiction in the judgment under appeal (İnal, 2002). However, even in this case, the possibility of refusing the Turkish court to declare the judgment enforceable should not be ruled out on the grounds that execution of the judgment could at the same time be described as contrary to Turkish public order (Nomer, 2013).

Also, as opposed to the Turkish public order, could be the enforcement of a judgment given by a foreign court that had no particular link to the dispute's subject matter, which was even subject to an express agreement of the two parties to arbitration by a particular arbitration body (Çelikel, Nomer & Esen, 2010).

10. The prohibition of opposition to public orders

The third condition set out in article 54 of Turkish Code of Private International and Procedural Law has been perhaps the most debated one. For this, more extensive case law has been formulated despite the fact that the law devotes a very short provision. In particular, the third condition under article 54 for the enforcement of foreign judgments is to state that "the decision is clearly not contrary to public order" (Şanlı, Esen & Ataman-Figanmeşe, 2014). The basic but unique element that is clear from this wording is that the opposition to public order must be obvious and not marginal or even simple (Turhan, 1996).

This is the second reference to public order in the Turkish Code of Private International and Procedural Law, with article 5 also stating that the provisions of applicable foreign law that are obviously contrary to public order are not applicable (Göyayla, 2001). However, in relation to article 5 of the applicable law, it should be made clear that the provisions of article 54 on public order do not refer to any opposition to the law applicable to the Turkish public order, but only to legal effects relating to the execution of the decision in Turkey (Göyayla, 2001).

The definition of public order, as has been provided by the case law, is not far from the definition in most European laws. Thus, to reject a request for the execution of a foreign decision for reason of its opposition to public order, it should contain a set of provisions opposing the fundamental legal, moral and conscious rules necessary to maintain a peaceful and harmonious coexistence in society⁴⁵.

Of course, because these results are directly dependent on both substantive law (*maddi hukuku*) and procedural rules (*usul hukuku*), it is not possible to execute a decision in the course of which important procedural rights of the defendant have been violated, with the prohibition of witnesses being examined only against the defendant (Nomer, 2008).

With regard to the recognition of foreign court decisions on a marriage solution by divorce, much debate has arisen in legal science on the recognition of consensual divorce judgments. Many decisions of the Turkish Court of Cassation (Nomer, 1987)⁴⁶ have been issued in connection with this issue, according to which such decisions cannot be recognised in Turkey because of the contradiction of the institution of the consensual court in public

⁴⁵Y. 2. HD 17.2.1997, E:675 K:1633, in *Yasa Hukuk Dergisi*, 1997, pp. 739.

⁴⁶See in particular: Y. 2 HD 28.01.1982 RG 1982, 17604, Y. 2 HD 12.04.1983 RG 1983, 18042, Y. 2HD 15.05.1984 MHB 1984, 94, YHD 1984, 1356.

order. The reasoning behind those judgments has been focused on the lack of consensual divorce in Turkish law and the corresponding violation of public order by the recognition of a divorce that does not meet the requirements of the law and is therefore disappointed⁴⁷.

These decisions were strongly criticised by most of the legal theory, which rightly observed that the reasons for those decisions were in full measure with the provisions of the Turkish Code of Private International and Procedural Law on the recognition and enforcement of foreign judgments. This view was initially followed by a small part of jurisprudence⁴⁸, but a complete conversion was made when the possibility of consensual divorce was introduced into Turkish family law (Nomer, 2008)⁴⁹.

Another interesting issue is the recognition of divorces issued in Muslim countries⁵⁰ with the implementation of Sharia law (Hefner, 2008). As for divorce, Muslim law allows someone to "relinquish" their spouse by pronouncing the word *talaq* three times before adult witnesses. The problem arising from the recognition of foreign marriage resolutions that use the *talaq* method relates to the opposition of this institution to the principle of equality enshrined in the Turkish Constitution in article 10. This is because the husband can unduly repudiate the spouse regardless of his or her own consent, whereas the spouse is only entitled to divorce under certain conditions. It has been ruled that it is clearly contrary to the Turkish public order to recognise a *talaq* divorce carried out without the spouse being asked about her desire to continue or terminate the marriage, because this constitutes a blatant opposition to the principle of fair trial and equality of the law enshrining both the Turkish Constitution and the European Court of Human Rights. Meanwhile, the recognition of a divorce obtained by the unilateral removal of the husband was not validated (or, more correctly, recognised) but subsequently by a judicial authority in which the spouse declared her consensus (Şahin, 2012)⁵¹.

Contrary to public order, it has been considered the recognition of a foreign judgment that was issued without any of the grounds for divorce under Turkish law (articles 161-166 of the Turkish Civil Code)⁵².

Another issue involves parental care (*velayet*) of minors⁵³. In many cases, the assignment of parental responsibility is at the same time the divorce proceedings of a child's parents and the recognition of the foreign decision on marriage is often accepted, but not in the judgment on parental responsibility (Akici & Göyayla, 2010)⁵⁴. Thus, it has been held contrary to public policy to recognise and enforce a foreign decision to resolve a marriage in part, which states that parental responsibility for the minors will be shared jointly by the two parents. Again, as in the case of consensual divorce, decisions of the Turkish Court of Cassation are based on the fact that because Turkish law does not recognise the joint exercising of parental responsibility by divorced parents⁵⁵, the execution of this type of foreign decision is obviously contrary to Turkish public order (Şimşek, 2007)⁵⁶.

⁴⁷Y. 2. HD 02.03.1990, in *İlmi Ve Kazai İçtihatlar Dergisi*, 1990, pp. 358.

⁴⁸Y. 2. HD 25.06.1986 E.3520 E. 5471 (*Kazancı Hukuk Otomasyonu*) with the opposite minority.

⁴⁹Initially, by amending article 134 of the old Turkish Civil Code with Law 3444/1988, which many Courts refused to implement as unconstitutional – a matter finally resolved by the decision of the Turkish Constitutional Court n. 43/1997 and now with article 130 of the new Turkish Civil Code introduced in 2001.

⁵⁰It is well known that although the vast majority of its population is Muslim, Turkey is a secular (*laik*) state (article 2 of the Turkish Constitution) that has adopted a family law based on the corresponding Swiss law and that certainly has nothing to do with Muslim law, which looks alien to the Turkish legal world.

⁵¹Turkish law contains the following six grounds for divorce: 1) adultery; 2) life impunity and ill treatment; 3) crime or an elite life; 4) abandonment; 5) mental illness; and 6) strong marital shock.

⁵²Y. 2. HD 28.02.1989 E.859/K.1759, in *Yargıtay Kararları Dergisi*, 1989, pp. 1087ss.

⁵³Particular attention is needed on this issue, as in matters of parental responsibility the relevant international conventions signed by Turkey are in most cases implemented.

⁵⁴With reference to Y. 2. HD 05.04.2004 E.3276/K.4252 and Y. 2. HD 02.04.2003 E.3784/K.4670 (*Kazancı Hukuk Otomasyonu*).

⁵⁵Article 336 of the new Turkish Civil Code: "(...) if the parents are married: 1. During the marriage, the father and the mother jointly exercise parental responsibility for the child; 2. When the marriage is terminated or annulled, the judge may assign parental responsibility to one of the two parents (...) as regards the content of parental responsibility, it shall include article 339 (...)"

⁵⁶Y. 2. HD 17.02.1997, in *Yasa Hukuk Dergisi*, 1997, pp. 739ss. Y. 2. HD 20.03.2003, in *İstanbul Barosu Dergisi*, 2003, pp. 1004ss and Y. 2. HD 22.11.2004 with minority see the cited author.

This view has also been strongly criticised by legal theory, through the argument that the assignment of joint parental responsibility cannot in any way be regarded as contrary to public order, let alone being "obviously" contrary to article 54. It should be noted that many international conventions to which Turkey is party have as their basic principle the best possible protection of the child's interests. As such, these can be considered to include the joint exercising of parental responsibility after the marriage has been resolved, starting with the perspective that although the marriage failed, there was no change in the love and interest of the parents towards the child (Erdem, 2006).

It has also been ruled out that an application for the enforcement of a foreign decision holding that a child's parental responsibility has been examined by the parents and their wishes, but without taking into account the interests of the child. Such an omission in a judge's decision inevitably leads, in view of both the provisions of the Turkish Constitution for the Protection of Children and the relevant international conventions ratified by Turkey, to rejection of the enforcement request because of its apparent opposition to Turkish public order⁵⁷.

With regard to the issue of kinship, it has recently been ruled that a foreign decision is not incompatible with the Turkish public order, according to which a child is not individually recognised as having the right to prejudice paternity, although this right is provided under the Turkish Civil Code⁵⁸. Indeed, this decision refers to the fact that, until the introduction of the new Turkish Civil Code in 2001, the country's family law did not include the child as a legitimate person for insulting paternity. On the contrary, to these persons are included only the spouse, himself or herself and the prosecutor, since in the *ratio* of the relevant provision of the old Turkish Civil Code of 1926, as interpreted during its term of office, the institution of paternity violation "mainly concerned the father and was set up in his own interest in order to get rid of a foreign child and the financial burden it entails!" (Paskoy, 2011).

As opposed to Turkish public order has been judged foreign judgments that determine the maintenance (Scherpe, 2016) to be paid by the person liable in excess of their monthly income (Sakmar, 1982).

With regard to adoption, foreign decisions have been judged contrary to Turkish public order that accept adoption despite differences between the foster parent and a child below the age of 18 years⁵⁹, or whether the adoption decision was adopted without regard to the child's interests⁶⁰. Something else that has been considered opposed to Turkish public order is the recognition of a foreign adult adoption decision by a foster parent who has other natural children⁶¹, something that is forbidden under Turkish law⁶².

In another case, a Turkish court rejected a request for the recognition of a German gender-based court ruling, considering it to be contrary to public order. The reasoning was that recognition of the decision was obviously contrary to public order, since the gender procedure did not follow that provided for in article 40 of the new Turkish Civil Code⁶³. However, the Turkish Court of Cassation withdrew the decision (by a majority), considering that the applicant did not obtain permission from the competent Turkish court on gender reassignment and that a German decision that does not refer to a medical opinion does not in itself constitute opposition to public order and therefore does not prevent recognition of that decision⁶⁴.

⁵⁷Y. 2. HD 28.02.1991 E.2108/K.3555 (*Kazancı Hukuk Otomasyonu*).

⁵⁸Y. 2. HD 04.05.2009 E.6063/K.8609 (*Kazancı Hukuk Otomasyonu*).

⁵⁹Y. 2. HD 12.04.2007 RG 08.05.2007-26516.

⁶⁰Y. HGK 01.10.2003, in *İstanbul Barosu Dergisi*, 2007, pp. 708ss.

⁶¹Y. 2. HD 30.6.2003 E.8317/K.8930 (*Kazancı Hukuk Otomasyonu*).

⁶²See article 313 of the new Turkish civil law.

⁶³Article 40 of the Turkish Civil Code provides, *inter alia*, that, for a change of sex, the person concerned must first have reached the age of 18 and not be married. In order to go ahead with the procedure, the person must first seek permission of the court, in which they must produce a medical opinion from a hospital medical board proving the necessity of the intervention. Only under these conditions is it possible to register the change in the registry after the intervention.

⁶⁴Y. 21.12.2009, E. 9678/K. 10608, in *İstanbul Barosu Dergisi*, 2012, pp. 225ss.

11. (follows) Procedural reasons

The impossibility of executing a foreign decision because of clear opposition to Turkish public order also exists where a judge finds that fundamental procedural rights recognised by Turkish law in the context of the right to a fair trial have not been respected. The violation of these fundamental principles, guaranteed both by the Turkish Constitution and by internationally ratified treaties such as the European Convention on Human Rights (ECHR), during adoption of the foreign decision prevents its execution in Turkish territory because of its opposition to the country's public order⁶⁵. In this case, it has been established indicatively by case law that a divorce decision issued by a foreign court against a defendant spouse who did not reside in the state of that court and whose residence was known was summoned to the foreign court as an unknown residence⁶⁶, when it is sufficient for the defendant to be summoned abroad to publish it in a local form and not to personally call him⁶⁷.

Opposition to public order can also be based on cases in which there is a reason for repeating the process (Alagoya, Yildirim & Deren, 2001, & Çelikel, 2010)⁶⁸ (*yargılamanın yenilmesi sebepleri*), provided that this is foreseen by the procedural law of the court seized. Such cases include, inter alia, the subsequent appearance of substantive documentary evidence or proof of falsity on which a decision was based, as well as subsequent conviction by the judge of misconduct against the defendant (Çelikel, 2010). If one of the above cases occurs, this factor may actually prevent the execution of this decision in Turkey because of public order opposition⁶⁹.

A question has also been raised in Turkish theory and case law on the execution of a foreign judgment when a judgment has been handed down by the Turkish courts on the same subject matter and between the same parties. Although the law does not contain any relevant rules, it is consistently stated in case law⁷⁰ that if a foreign judgment whose enforcement is sought is contrary to the decision of a Turkish court on the same matter, it cannot be enforced, irrespective of whether the foreign decision was issued before or after the corresponding Turkish one (Sakmar, 1982). If, therefore, despite the existence of a contrary Turkish decision, the competent Turkish court has declared the foreign judgment enforceable, this fact gives rise to both grounds for appeal (*temyiz sebebi*) and a reason for rejoicing (*yargılamanın yenilmesi sebebi*) the enforceability judgment (Nomer, 2008 & İnal, 2002).

On the other hand, it has been rightly assumed that the enforcement of a foreign court judgment awarding compensation for a road accident cannot be considered contrary to public order, but the defendant was found to be unsubstantiated by the decision of a Turkish criminal court (Sakmar, 1982). Moreover, with regard to the judgment of a criminal court on the defendant's responsibility, it is consistently accepted by case law that it does not bind the civil court hearing the claim for damages⁷¹.

However, it has been argued that it is not always possible to exclude the execution of such a decision as contrary to Turkish public order, since in the event that a lawsuit in the Turkish courts occurs after the foreign decision was taken, the action should be considered of bad faith and therefore the enforcement of the former should not be prevented, as the objection to public order would be abused (Kuru & Çelikel, 2010)⁷². If, after an application for

⁶⁵Turkey is party to the 1961 European Convention on International Commercial Arbitration ("Geneva Convention") and the 1958 New York Convention, which was ratified on 2 July 1992 and entered into force on 30 September 1992. Turkey also ratified many bilateral and multilateral treaties and conventions, such as the Convention on Settlement of Investment Disputes between States and Nationals of Other States ("*ICSID Convention*"), which entered into force in 1989, and the Energy Charter Treaty and Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects (*PEEREA*), which was published in the Official Gazette in 2000.

⁶⁶Y. 2. HD 25.06.2009, K.12603. This could also be included in the last provision of article 54, if a complaint is made.

⁶⁷Y. 2. HD 26.06.1987, K.5571, in *Yasa Hukuk Dergisi*, 1998, pp. 1457, but where it is stated that if the defendant finally joined the trial, then there is no obvious opposition to the Turkish public order.

⁶⁸The term "*yargılamanın yenilmesi*" or "*iade-i muhakeme*" as defined in the old HMK could be attributed to Greek as a "rejoinder", as the relevant process in Turkish law in many respects resembles the provisions of 539 et seq. of the Greek Code of Civil Procedure.

⁶⁹See also the reasoning in a *Yargıtay* judgment that dealt with the fact that, following the extradition of the foreign judgment, enforcement of the document is on the basis of the documentary evidence (other previous judgment) on which the foreign court was based for the admissibility of the action. Y. 2DH 15.11.1984, in *Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni*, 1986, pp. 200ss.

⁷⁰Y. 2. HD 08.12.1993 E. 9648/K.11903, Y. 2. HD 15.12.1998 E.11732/K.13640 (*Kazancı Hukuk Otomasyonu*).

⁷¹Y. 11. HD 23.02.2004, E. 2003/7126 K. 2004/1571 (*Kazancı Hukuk Otomasyonu*).

⁷²In addition, according to the supporters of that view, the adoption of a second decision on the same parties and subject is forbidden and

a declaration of enforceability has been submitted to the competent court of first instance, an action is brought before a Turkish court for the settlement of the same dispute, it is reasonable to raise the issue of *lis pendens* once the first application has been lodged.

However, the answer given by Turkish theory is negative because no identity is ascertained in the lawsuits of each trial: in one, we have a solution to the dispute in which its substance is examined, and in the other a request for an *exequatur* to examine the conditions of the Turkish Code of Private International and Procedural Law and not the substance of the case. In this case, the most appropriate solution is to abstain from the Turkish court of substance from examining the case until the court takes a decision on the execution of the foreign decision, and if the latter is accepted, then the former will be rejected because of *res judicata*. In any case, however, if recognition of the foreign decision alone is sought, it may be requested incidentally by the party concerned in an action pending in Turkey, to reinforce the allegations with evidence that procedures are foolproof (Çelikel, & Nomer, & Esen, 2010).

Evidently opposed to Turkish public order are also decisions that are devoid of reasoning – that is, those that, after the facts are quoted, end up in the operative part⁷³. It has also been ruled that when an application for recognition of a foreign judgment is abused, contrary to the rules of good faith, the application for recognition is rejected because of its abusive nature; its recognition in Turkey would be contrary to the rules of public order⁷⁴.

12. Respect for the right to legal defence before a judgment is given to the foreign court

The last condition of article 54 of the Turkish Code of Private International and Procedural Law relates to the defendant's enforcement, referring to the right to defend one's interests before the foreign court during the hearing of the claim (Nomer, 2013). This is a manifestation of the right to a fair trial guaranteed by the Turkish Constitution and the ECHR⁷⁵. Critical matters to which the law refers relate to: a) an appropriate appeal for representation during the hearing of the claim; b) whether he or she was actually represented in the trial; and c) whether the case was lawfully discussed *in absentia*.

However, the basic feature of this provision of article 54 is that the court will examine whether the above conditions have been met only if the defendant has complained that none of them are fulfilled. That is to say, in this case, the condition is not investigated by the court of its own motion, as is done under the condition of public order⁷⁶, but only on appeal by the person against whom enforcement is sought⁷⁷. The provisions of procedural law that indicate how the defendant is summoned and represented in the proceedings and in the absence of such a hearing are those of the foreign court. It is therefore not lawful for the defendant's assertion, for example, to execute the service if the claim was filed within a shorter time limit than the Turkish Code of Civil Procedure and therefore the last condition of article 54 is not met. In our view, though, we should not exclude the possibility of refusing to execute the decision in Turkey, for example, in foreign law, the term of service to a foreign resident was very short. However, the reason for refusing the enforcement request should be sought in dealing with such an execution as contrary to the Turkish public order because of a violation of the right to a fair trial, which of course is being investigated *ex officio* (Nomer, 2008).

is the reason for the resumption of proceedings for the second decision under article 445 of the new Turkish Code of Civil Procedure.

⁷³Y. 2. HD 30.06.1999 E.5858/K.7609, in which it was held that the recognition of a divorce decree issued by the Sydney family court, but without any such justification, is contrary to the Turkish public order.

⁷⁴Y. HGK 11.10.1972 E.453/K.829, in İstanbul Barosu Dergisi, 1974, pp. 548, in which an application for recognition of a divorce decree issued abroad was dismissed as unfair and contrary to public order because the applicant spouse had been represented at the divorce proceedings brought by her husband in Turkey and had refused the basis of the claim for the rejection, so that there was no *res judicata* for marriage on the basis of a decision by a Turkish court so that it can freely recognise the decision favourable to that foreigner.

⁷⁵See article 36 par. 1 of the Turkish Constitution and article 6 of the ECHR. According to Turkish case law, timely summons are therefore a prerequisite for a fair trial, so the defendant has the time to prepare properly to put forward the allegations and evidence deemed necessary, as well as to challenge his or her respective claimant, AYM 28.09.1995 E.42/K.53 R.G. 16.05.1997, 22991.

⁷⁶Y. 2. HD 25.06.1987 E. 4539/K.5571, in Yasa Hukuk Dergisi, 1988, pp. 1457ss.

⁷⁷Y. 2 HD 04.11.2004, E; 10683/K.13120, in İstanbul Barosu Dergisi, 2007, pp. 709, which states that examination of whether the foreign judge's procedural rules have been complied with for the summoning or absent-minded hearing of the case does not constitute a breach of the rule of non-examination of the correctness of the foreign decision.

With regard to the burden of proof for inappropriate summons and representation of the defendant in a foreign court, proof must be given to the claimant, who must provide all information required by law for enforcement of the judgment. In contrast, the defendant's claim to prove that they were not summoned correctly is far from perfect, given that his or her objection often refers to total ignorance of the trial and no evidence is therefore in their hands – unlike the plaintiff, who also initiated the entire judicial process abroad (Çelikel, 2010).

In a case that divided theory and case law, the Turkish Court of Cassation was called upon to judge whether it was a violation of the defendant's right to defend himself against the enforcement of the decision, not to represent the defendant in fault, not the plaintiff but the lawyer of the defendant himself. The question was therefore that, despite the fact that the defendant was lawfully summoned in time to appear in the trial, and to that end he instructed a lawyer to appear on his behalf, his lawyer was not represented by his own fault, the defendant has to be convicted and the decision against him be issued. The court held that this case did not fall under the fourth indent of art. 54, as this would in principle require a lawful summoning of the adversary, which was not the case here⁷⁸.

It is noteworthy that the old Turkish Code of Private International and Procedural Law of 1982 laid down art. 38 and a fifth condition: if the defendant was a Turkish resident, a judgment could only be enforced if the foreign court applied the law that under the rules of association of the Turkish, private international law would be applied by a Turkish court if it had been dealt with. This provision was intended to protect Turkish residents alone, precluding the possibility of coming from abroad even if a law was adopted other than that applied by Turkish courts. However, because of its purely subjective nature, this provision was removed from art. 54 of the Turkish Code of Private International and Procedural Law (Şimşek, 2007).

With regard to the abrogated provision above, the question has been raised in many past cases of whether a foreign decision can be enforced if Turkish law has been implemented but it has incorrectly applied because of poor interpretation or the application of irrelevant provisions⁷⁹, or it was wrongly assessed and despite the Turkish law the evidence⁸⁰. Any rejection by a Turkish court of the application for enforceability due to the incorrect application of the applicable law by the foreign court would run counter to the basic principle of Turkish private international law that it has no right to review the content of the foreign decision.

The position claimed was that such a decision was contrary to Turkish public order, but that did not accept the case law of the Turkish Court of Cassation, which reiterated once again that the Turkish court does not have the power to check the substance of the case⁸¹. In a relevant plenary decision stating that it is not for the Turkish court of recognition to determine whether the applicable law was correctly applied, the defendant had the opportunity to challenge the foreign decision in a higher court of the State in which it was issued proposing its political divisions; the objection to public order was rejected by our argument, which is very pertinent, that the defendant was able to propose the correct application of Turkish law to the alien court and exhausting the means provided there⁸².

13. (follows) Service of an application

Pursuant to art. 55, an application for recognition of a judgment, together with the prescribed trial date, is served on the defendant. Any failure by the applicant to perform the intended service will result in rejection of the request for recognition of the granting of enforceability, as the defendant denies the right of defence⁸³. The same

⁷⁸Y. 2. HD 12.04.2000 E.2634/K.4605 (*Kazancı Hukuk Otomasyonu*).

⁷⁹Y. 11. HD 15.09.1989 E.5912/K.4324 (*Kazancı Hukuk Otomasyonu*).

⁸⁰Y. 11. HD 15.09.1989 E.5912/K.4324 (*Kazancı Hukuk Otomasyonu*).

⁸¹Y. 2. HD 27/10/1995 E.10281/K.11167, in Yargıtay Kararları Dergisi, 1996, pp. 528ss and Y. HGK 21.06.2000 E.1051/K.1068.

⁸²HGK 21.6.2000, in Yeni Hukuk içtihat Dergisi, 2000, pp. 1510ss, but left open the possibility of considering opposition to Turkish public order if, despite the defendant putting forward relevant arguments and objections to the highest court of the foreign state to which they could have recourse under foreign procedural law, Turkish law was nevertheless applied incorrectly.

⁸³Y. 2. HD 08.04.2008 E.4203/K.4879 R.G. 07.05.08-26869.

precondition applies to cases of voluntary jurisdiction (*ihtlafsız kaza kararları*), but not to those in which there was no other party (*hasımsız ihtlafsız kaza kararları*), so that there is no question of service to the defendant (Çelikel, 2010).

It is worth noting, however, that under the Hague Convention on Civil Procedure of 1954⁸⁴, the decision of another contracting State is enforceable with respect to the costs of proceedings without the need for the defendant to be heard, offence against the wrong interpretation of its law. This is perhaps the only case in which a Turkish *exequatur* declares a foreign decision enforceable without summoning the plaintiff (Günseli, 1999-2000).

Cases relating to the recognition and enforcement of foreign judgments are subject, in accordance with art. 55 par. 1, to a special procedure in which so-called "simplified procedural rules" (*basit yargılama usulü hükümleri*) are applied (Ekşi, 2007, & Nomer, 2008). The inclusion of such cases in this process was preferred by the legislator (Kuru, 2008)⁸⁵ for two main reasons: 1) a desire not to delay the completion of recognition and enforcement; and 2) the choice of carrying out the whole process in writing and using facts and figures notified to the other party from the outset. This means all the facts are known and the evidence is documented (Çelikel, 2010).

Objections to enforcement or recognition of the defendant are referred to in the second paragraph of art. 55. The defendant is entitled to plead before the court either that one of the conditions laid down in paragraphs 50 to 55 of the Turkish Code of Private International and Procedural Law is not fulfilled, or that all or part of the operative part of the decision has already been executed in Turkey or elsewhere (for example, in the country where the decision was made). These reasons are restrictive and not indicative, and are therefore – as seen above – not legitimate the defendant's objection concerning the legal or substantive correctness of a foreign decision.

Under art. 56, the court fully (*tamamen*) or partially (*kısmen*) accepts an application for a declaration of enforceability or rejects the request in its entirety. A decision is issued subsequent to a test of the foreign decision, bearing at the end the stamp and signature of the issuing judge (Çelikel & Erdem, 2016).

The decision of the *exequatur* decision has the force of *res judicata*, like any decision by a Turkish court, after the deadline for review has been set aside or if an appeal is made after it has been rejected (Çelikel & Erdem, 2016). This means that no new legal remedy may be ruled in the Turkish courts, and if this is the case, the defendant may propose an objection to the existence of *res judicata*⁸⁶ (*kesin hüküm itirazı*) – something that may be raised at each stage of the trial⁸⁷.

The execution of such a decision is made in accordance with art. 57 par. 1, like any other decision of the Turkish courts, in accordance with the provisions of the Code of Conduct and Bankruptcy (*İcra ve İflas Kanunu*) (Kuru, Arslan & Yilmaz, 2008)⁸⁸. However, it is not possible to execute judgments that do not comply with the provisions

⁸⁴"Convention de La Haye relative à la procédure civile" (1954), which was ratified by the Turkish National Assembly and entered into force on July 11, 1973, as well as by another 39 states, but not Greece and other European states.

⁸⁵See also articles 316-322 of the new Turkish Code of Civil Procedure (*HMK*), which entered into force on 12.1.2011 and replaced the previous (old) Turkish Code of Civil Procedure of 1926, which governed this special procedure in articles 507-511. The main differences identified in this "simplified procedure" are: a) the extension of the time limit which the defendant may require for his or her first reply to the application and exclusion of the rejoinder or the second response of the applicant and the defendant respectively; b) the mandatory reporting of all the facts and evidence relied on or that will be provided by the applicant subsequently, without being able to be invoked or referred to for the first time in the trial, while any change or extension of the claimant's and defendant's claims is forbidden after the applicant's filing of the application and the first reply of the defendant respectively; c) the possibility for the court to take a decision without the parties being summoned to the proceedings and only with the information contained in the file; while d) a particular feature of this procedure is the possibility of initiating a decision without explanation in the form of a report in the reasoned judgment of the court, and this should also be published at the latest within one month of the publication of the minutes.

⁸⁶Y. 14. HD 30.01.1978, E.4822/K.546, in *Yasa Hukuk Dergisi*, 1978, pp. 473ss.

⁸⁷Y. HGK 20.01.1988 E.517/K.37, in *Yasa Hukuk Dergisi*, 1988, pp. 1629ss.

⁸⁸Law 2004 ratified by the Turkish National Assembly on 9.6.1932. For the extensive recent amendments to this code see: T. Uyar, G. Uyar, 6352 Sayılı, 2.7.2012 Tarihli Kanun ve 6103 Sayılı, 14.1.2011 Tarihli Kanun ile *İcra ve İflas Kanunu*'nda Yapılan Değişiklikler ve Yenilikler, in *İstanbul Barosu Dergisi*, 2005, pp. 33ss.

of art. 297 of the new code (art. 389 of the old Turkish Code of Civil Procedure) requiring the operative part of a decision be clear without giving rise to any doubt or uncertainty (*açık, şüphe ve tereddüt uyandırmayacak şekilde*) (Nomer, 2008)⁸⁹.

Decisions on recognition and enforcement issued by the Turkish courts can also be appealed in accordance with the grounds for appeal set out by the new Turkish Code of Civil Procedure, while it is explicitly stated that an appeal will suspend their execution. It is interpretive that these decisions are also appealed by a re-enactment if there is any reason for renunciation (Çelikel, 2010).

14. Requests for the recognition of foreign judgments

Apart from requests for the execution of a foreign decision within Turkey, a request can only be made for the recognition of a decision. This is the case either when the applicant has no voting rights (*eda hükümleri*) or when the applicant wishes, for his or her own purposes, only recognition and not execution (Şimşek, 2007, Ekşi, 1996, & Çelikel, 2010)⁹⁰, or, finally, when condition a) of art. 54 of *MÖHUK*, required for execution but not for recognition.

Recognition of the foreign decision can be made either by way of interruption to an action already brought before the Turkish courts or by a separate application specifically requesting its recognition. These two possibilities are expressly referred to in art. 58 of the Turkish Code of Private International and Procedural Law, which reads as follows: 1) In order for a foreign judgment to be admissible as a complete proof (*kesin delil*) or as a *res judicata* (*kesin hüküm*), the court must investigate whether the conditions for the execution of foreign judgments are met. The first paragraph a) of art. 54 shall not apply to recognition; 2) Voluntary cases are subject to the same provisions; 3) The same procedure applies to any administrative action in Turkey based on a foreign judgment.

With regard to the conditions for recognition of foreign judgments, art. 58 par. 1 thus refers to the general provisions of articles 50 to 54 that must be fulfilled for their enforcement, with the exception of the case referred to in a) of art. 54, which is not applicable (Şimşek, 2007). It is therefore not necessary to establish the principle of reciprocity in order to (only) recognise in Turkey a judgment of a foreign court. This exception has been perceived by Turkish theory as corresponding to the provision of paragraph 5 of the German ZPO (German Code of International Private and Procedural Law) (Aksoy, 2014), which states that while reciprocity is a prerequisite for the recognition of a foreign decision, its absence is not an obstacle to the recognition of those provisions that do not refer to asset-related claims (Nomer, 2008). This view has been criticised by some theorists under the belief that it allows the recognition of foreign judgments without guaranteeing the corresponding recognition of Turkish judgments in these states.

Regarding the procedural aspect, as mentioned before, recognition can be done either incidentally or independently. In the first case referred to in the first paragraph of art. 58, a foreign decision may be sought in an existing trial before a Turkish court by a party in order to be used either as a matter of *res judicata* for the subject matter of the dispute, a question referred for a preliminary ruling that depends on the outcome of the dispute (Çelikel, 2010)⁹¹, or, in the absence of identical subject matter and the parties to the dispute (Nomer, 2008), as

⁸⁹In that paragraph, it is possible to present obstacles to the enforcement of those decisions which, without specifying the amount to be paid, simply refer to "payment of legal interest on late payment" or "legal value added tax", without being easily identifiable based on the decision.

⁹⁰In this case, however, it is argued that the legitimate interest of the applicant for recognition should be investigated: see, Y. 13.HD 30.06.1983 in *Yasa Hukuk Dergisi*, 1990, pp. 1029, in which it was held that the application for recognition of a foreign decision concerning a debt claim was properly rejected since the applicant had no legal interest in recognising it, but instead had to demand her declaration as an executor. In contrast, see İstanbul Asl. H.M. 03.05.1997 E.1278/K.374, in which it was held that the applicant for recognition of a foreign judgment has a legitimate interest in seeking only its recognition because the claimant's claim is not the recovery of the claim but also the recognition by Turkey of a final judgment so that the other party cannot raise future action on the same subject matter in the Turkish courts.

⁹¹According to the author: states, inter alia, the following examples: a) German A submits a Turkish court claim against Turkish citizen B, claiming compensation of E. 20,000; B puts forward a *res judicata* (*kesin hokum itirazı*) seeking the recognition of a German court ruling on the same subject matter and the same parties that dismissed an action for damages for A for the same cause. If the court finds that the conditions for recognition of the judgment are satisfied, it will reject the claim brought before it by A; b) A files a claim against B for

proof that it produces full evidence of its content. In any case, since there is no need to have an identity between the claim in the Turkish court and the operative part of the foreign judgment, of the foreign divorce decision, is not prevented from examining the same other claims of the plaintiff that have not been judged abroad, such as the claim of the non-labile spouse for compensation for pecuniary or non-pecuniary damage resulting from the division of marriage (Akici & Göyayla, 2010)⁹² (art. 174 of the Turkish Civil Code). It has also been ruled that it is possible to convert (*islah*) divorce proceedings (Şanlı, Esen & Ataman-Fıganmeşe, 2014) brought before the Turkish courts in a claim for recognition of a foreign divorce decree when there is a final foreign divorce judgment between the same parties⁹³.

In any case, it has been judged by jurisprudence that a foreign decision can be freely assessed as evidence in a trial in Turkish courts and together with other types of evidence when a judge is forming a judgment, even if its recognition is not explicitly requested by a party⁹⁴.

The second case is that of the recognition of a trial specifically raised for that purpose by the person concerned, when required, as typically stated in art. 58 par. 3, "to carry out any administrative action in Turkey" (*Türkiye'de idarî bir işlemin yapılmasında*). In such a case, it is clearly a matter of identifying the treatment (*tesbit davası*) (Sakmar, Ekşi & Yılmaz, 2001). The provision contained in art. 62 par. 3 concerns, in particular, family-based legal decisions such as divorce, adoption and recognition of paternity recognition. Although not amenable to enforcement, these must be recognised by Turkish authorities to be entered in the registry. It is also characteristic that the Turkish "Registry Service Act" for the registration of changes resulting from foreign court rulings requires a decision from the Turkish courts for them to be recognised. This law was apparently taken into account by the legislator through reference to "administrative actions", thus defining the procedure for required recognition of a foreign decision (Burcu Yuksel, 2014).

With regard to the issue of recognition in particular, two questions have been raised in theory and case law: a) whether the procedural provisions laid down for enforceability cases and in particular those for service to the opposite party are applied proportionally; and b) whether the effects of recognition came retroactively from the final judgment of the foreign decision or from the date of recognition by the Turkish Court.

Concerning the first question, it was argued that since there is no explicit reference to art. 58, it is not necessary to summon the opposing party in cases where recognition is sought by a separate document and the judge therefore makes the decision only by studying the file without discussion. However, most of the theory, as well as case law, accepts that it is necessary to summon the other party, arguing that it is otherwise not possible to raise the defendant's objection to the foreign court – which, as we have seen, is a prerequisite for the enforcement (and therefore recognition) of a foreign decision under art. 54 par. (ç), but is not investigated on its own initiative but only upon objection (Çelikel, 2010). It was therefore reasonably believed in many cases that the adoption of a recognition decision without summoning the adversary contravenes the law which clearly protects the defendant's right of defence⁹⁵.

With regard to the question of the start of recognition of foreign judgments, it was argued that by their nature as "rule-making" (*inşai or yenilik doğurucu kararlar*) judgments, they also produce legal effects in Turkey, not from

fulfilment of a liability. B puts forward a similar claim against A. A in turn asks for recognition of a foreign decision that has recognised the non-existence of the claim relied on by B. In this case, the court must again dismiss the lawsuit; c) The brother of the deceased B carries out as her heir a clerical suit against C, who has the same inheritance rights as B's married spouse. However, A requests the recognition of a foreign divorce decree before B's death, and hence claims that C has no inheritance rights. If the conditions for recognition are met, the court will reject the claim of the same inheritance right of C.

⁹²Y. 2. HD 25.12.2007 E.21926/K.17735 (*Kazancı Hukuk Otomasyonu*). Similarly, the tribunal for the recognition of a foreign divorce may itself consider issues of maintenance or custody of children if there are no relevant provisions in the foreign decision or if they can not be enforced in Turkey.

⁹³Y. 2. HD 05.06.1998 E.5745/K.7116.

⁹⁴Y. HGK 24.10.2001 E: 13-1003, K: 763 (*Kazancı Hukuk Otomasyonu*).

⁹⁵Y. 2. HD 16.05.2002, E. 2458/K. 2905 and Y. 2. HD 07.10.2002, E. 10804/K. 11537 (*Kazancı Hukuk Otomasyonu*), in which the decision to recognise a foreign divorce decision (Turkish) was issued without the summoning of the other divorced spouse.

the day of the adoption of a recognition decision, but by the final judgment of the recognised foreign judgment (Nomer, 2008). There has been a debate on this issue for many years, but this has been definitively resolved by art. 59 of the Turkish Code of Private International and Procedural Law, which now explicitly states that "(...) the *res judicata* or the full probative force of a foreign judgment shall be governed by the final judgment of the foreign decision (...)" (Günseli, 1999-2000).

Lastly, in relation to the recognition of decisions of voluntary jurisdiction, art. 58 par. 2 reiterates that the same provisions apply to their recognition. It is, however, worth mentioning the case of these decisions, which have a formal resolute but not essential – such as, for example, the decision to issue a certificate (*mirasçılık belgesi*). This is externally in the form of a judicial decision and therefore ends after the prescribed period has expired, but has no effective judicial resonance in the sense that the content of the certificate can be modified at any time subsequent decision (Çelikel, 2010). In such cases, the Turkish courts have refused to recognise these judgments because of the absence of the element of a substantive *res judicata* for the decision⁹⁶, but the foreign decision cannot be excluded as evidence of the person concerned for the request for an issue of a certificate by the competent Turkish court (Sakmar, 1982).

15. Special procedures for the recognition and enforcement of foreign judgment in multilateral international conventions

Apart from articles 50 to 59 of the Turkish Code of Private International and Procedural Law, the recognition and enforcement of judgments relating to certain matters – in particular, family law – are governed by more specific international treaties, of which Turkey is a contracting party. These provisions override common law under art. 90 of the Turkish Constitution, as amended in 2004, and of course only concern decisions taken by a State party to a convention.

In the Hague Convention on "the Protection of Children and Cooperation in Transnational Adoption" of 1993⁹⁷, art. 24 states that after the completion of the procedure between the central authorities provided for in the convention, the competent authorities of a contracting State "refuse to recognize an adoption if it is manifestly contrary to public order, taking into account the interest of the child" (Nomer, 2008). A refusal to recognise a transnational adoption by a contracting State is therefore not sufficient to prevent the adoption of a manifest public opposition in its national public order, provided that it is in the interest of the adopted child.

In the Hague Convention on "Recognition and Enforcement of Decisions on Maintenance Obligations" of 1973⁹⁸, articles 4 and 5 lay down more specific conditions for the recognition and enforcement of such judgments given by courts of the contracting parties. Among these is the second paragraph of art. 4, which states that: "(...) interim enforceable judgments and interim measures, even if they are subject to regular legal remedies, are recognized or declared enforceable in the State of enforcement if such decisions are issued and enforced to this". These are the few cases in which enforcement of a provisional enforcement order or precautionary measures of foreign courts are accepted (Nomer, 2013).

Special provisions also include art. 1 of the 1967 Luxembourg Convention on "the Recognition of Marriage Related Matrimonial Matters" (Nomer, 2008)⁹⁹. This provides as conditions for the recognition of judgments

⁹⁶Y. 2. HD 10.02.1986, E. 86/K. 802-Y. 2. HD 11.06.1990, E. 12861/K. 5906-Y. HGK 28.12.1994, E. 2-625/K. 905 (*Kazancı Hukuk Otomasyonu*).

⁹⁷"Convention du 29 mai 1993 sur la protection des enfants et la coopération en matière d'adoption internationale", which has been ratified by the Turkish National Assembly and came into force on 1.9.2004, and was recently ratified by Greece under Law 3765/2009.

⁹⁸"Convention du 2 octobre 1973 sur la loi applicable aux obligations alimentaires", which was ratified by the Turkish National Assembly and came into force on 1.11.1983, and has been ratified by Greece under Law 3171/2003. It should also be noted that both Greece and Turkey have expressed a reservation on the recognition of decisions and compromises in food affairs between relatives in a line of law and between relatives by marriage, while Turkey has also expressed reservations with regard to the recognition of decisions and compromises that do not provide for periodic maintenance payments.

⁹⁹"Convention de Luxembourg du 8 septembre 1967 sur la reconnaissance des décisions relatives au lien conjugal". This convention was

relating to marital affairs: a) not to be a foreign judgment contrary to another final judgment given or recognised in that State; b) that the parties have had an opportunity to appear in the case; and c) that the decision is not manifestly contrary to the public order of the host State. Art. 2 refers to so-called "exorbitant jurisdiction" by a court of first instance, which, under that article, does not constitute a legitimate reason for rejecting a request for recognition of a foreign judgment, unless both parties have the nationality of State recognition.

Finally, in relation to the 1980 Luxembourg Convention on "Recognition and Enforcement of Custody Decisions"¹⁰⁰, art. 10 par. 1 of this convention identifies certain arrangements that are different from ordinary law. In particular, it is stipulated that if, owing to a change in circumstances (not including a mere change in a child's place of residence due to illegal movement), the effects of the original decision are no longer in conformity with the child's interests, then recognition and enforcement of this judgment may be refuted by a contracting State (sub par. b). In addition, this right is granted to contracting states when either the child has the nationality of the requested State or has been habitually resident in that State, while no such link existed with the issuing State, either the child had at the same time the nationality of the issuing State and the requested State and their habitual residence in the requested State (sub par. c). We therefore see that in such cases, the convention places particular emphasis on the nationality or habitual residence of the child, thus building a "firewall" with regard to the jurisdiction of the competent courts.

16. Legal framework for recognition and enforcement of foreign arbitration decisions

In addition to the recognition and enforcement of foreign judgments, the second part of the Turkish Code of Private International and Procedural Law – in particular, articles 60 to 63 – refers to these activities in relation to foreign arbitration judgments (*yabancı hakem kararları*). The reference to specific articles in the law on arbitration judgments reveals the importance that the legislator has given to the need to apply foreign arbitration decisions.

The importance of the recognition of foreign arbitration judgments is also reflected in the fact that they were recognised and applied in Turkey even before 1982, although art. 532 of the old Turkish Code of Civil Procedure did not say anything about them (Çelikel, 2010). It is even mentioned in the bibliography that between 1927 and 1949, case law accepted the application of arbitration judgments relating to all disputes from a contract as a performance of the parties' contractual obligations, and that later, until 1982, case law of the Turkish Court of Cassation applied proportionate provisions on the recognition and enforcement of foreign judgments to them (Ekşi, 2005).

However, apart from the provision in the Turkish Code of Private International and Procedural Law, there is much other relevant legislation in Turkish law on the recognition and enforcement of foreign arbitration judgments. Of course, the 1958 International Convention "on the recognition and enforcement of foreign arbitral judgments"¹⁰¹ is in dominant position. Turkey has also signed and ratified other multilateral conventions, such as the 1965 International Convention on the Settlement of Investment Disputes (ICSID) and the 1988 Multinational Investment Agency Agreement (MIGA). There is also a series of bilateral conventions that establish arbitration for differences between foreign investors and the Turkish State (Akinci, 2011). On 21 June 2001, the Turkish Parliament enacted Turkish International Arbitration Law (IAL) No. 4686, which is based on UNCITRAL Model Law (1985) and the Swiss Federal Statute on Private International Law of 1987 – as well as, to a lesser extent, the New French Code of Civil Procedure (Kocasakal, 2007). The IAL excludes disputes related to real rights (in rem) concerning immovable properties in Turkey. One may, however, wonder whether disputes concerning in rem rights

signed in 1990 by seven states, including Greece, but only three of them, namely Germany (with effect from 10.12.1977), the Netherlands (with effect from 30.7.1981) and Turkey (where it entered into force on 14.7.1975); it therefore applies only to cases of recognition and enforcement between them that fall within the scope of the treaty. As already mentioned, Greece has not yet ratified it.

¹⁰⁰"Convention européenne sur la reconnaissance et l'exécution des décisions en matière de garde des enfants et le rétablissement de la garde des enfants", which was ratified by the Turkish National Assembly and came into force on 2.11.1999; Greece had already ratified it under Law 2104/1992.

¹⁰¹This has been ratified by the Turkish National Assembly and entered into force on 30.9.1992; it had already been ratified by Greece under L.D. 4220/1961.

located in a foreign country would also be deemed non-arbitrable under the IAL (Betancourt, 2017). In addition, disputes for which the subject is not within the parties' disposal (criminal law, family law, disputes concerning employee payments and other public law matters) cannot be subjected to arbitration under the IAL. Where the "foreign element" of Article 2 is missing are regulated by the Turkish Code of Civil Procedure No. 6100 (last amended in 2011), which is also based on UNCITRAL Model Law and seeks to bring domestic arbitration closer to standards for international arbitration (Cosar, 2013, & Aygöl, 2011). The recognition and enforcement of foreign awards (Papian, 2007) is regulated by Law No. 5718 on International Private and Procedure Law (Kronke, Nacimient, Otto & Port, 2010). A first particularity of arbitration law in Turkey is that international arbitration (Ziya, 2013). Following the establishment of the Istanbul Arbitration Centre (ISTAC) by Law 6570 of 1 January 2015 and the start of its operations on 26 October 2015, along with the publication of the ISTAC Rules (which are very similar to the ICC Rules), an upward trend in the use of commercial arbitration is anticipated (Diel-Gligor, 2017).

It should therefore be noted in principle that, in cases where a bilateral or multilateral agreement ratified by Turkey is in force, the provisions of the applicable convention will apply (art. 1 par. 2 of Turkish Code of Private International and Procedural Law). With regard to the 1958 International Convention on New York, it should be noted that it concerns only arbitration judgments originating in contracting states that deal with disputes relating to commercial law¹⁰² (Erdoğan & Gelenk Vural, 2016).

Although the text of the convention did not in principle limit its scope to certain categories of disputes, it allowed contracting states to declare that it would apply only to legal, contractual or non-contractual disputes that by their law are considered commercial (art. 1 par. 3) – a statement made by Turkey (Şanlı, 1997-1998), as is the case with most contracting states. For any arbitration on a trade dispute arising from a State that is party to the New York Convention, the provisions of the treaty therefore apply.

With regard to the international conventions cited above, there will be no particular examination in this study, given that there is extensive literature that focuses on current research into the study of the provisions of articles 60 to 63 of Turkish Code of Private International and Procedural Law, with a comparative reference to corresponding provisions of the conventions and references to case law. Articles 60 to 62 refer to the procedure for the enforcement of foreign arbitration judgments, with article 63 referring in turn to the provisions of those articles and stating that "the recognition of foreign arbitration judgments is subject to the provisions on their execution (...)" (Şanlı, 1997-1998).

17. The "alienity" of arbitration judgments

A key element and starting point for recourse to art. 60 et seq. of the Turkish Code of Private International and Procedural Law is the determination of the foreign element in an arbitration judgment, since only then is the process of recognition and enforcement in Turkey necessary. The first question to be answered is therefore: how do we determine whether an arbitration decision is domestic or foreign, and if it is the latter, how will its "nationality" be determined? Unlike article 1 of the New York Convention¹⁰³, the Turkish Code of Private International and Procedural Law does not contain a provision specifying which arbitration decision is foreign. Thus, the relevant judgment is left to the judge to declare its execution.

¹⁰²See some of the most important cases in this sector: *Kilic Insaat Ithalat Ihracat Sanayi ve Ticaret Anonim Sirketi v. Turkmenistan*, in which the claimant applied for annulment of the decision, and the *ad hoc* committee refused claimant's application on 14 July 2015; *Içkale Insaat Limited Sirketi v. Turkmenistan*, in which the tribunal dismissed the claimant's claims in their entirety for lack of merit; *Garanti Koza LLP v. Turkmenistan*: pending (each party filed a statement of costs on 22 January 2016); *Muhammet Çap & Sehil İnşaat Endüstri ve Ticaret Ltd Sti v. Turkmenistan*: the tribunal issued Procedural Order No. 6 concerning the respondent's request on 29 September 2015 and the claimants' request of 1 December 2015 on 9 February 2015); *Federal Elektrik Yatırım ve Ticaret AŞ and others v. Republic of Uzbekistan*, where the tribunal was reconstituted on 3 March 2016; *Güneş Tekstil Konfeksiyon Sanayi ve Ticaret Limited Şirketi and others v. Republic of Uzbekistan*; *Karkey Karadeniz Elektrik Üretim AS v. Islamic Republic of Pakistan*; *Aktau Petrol Ticaret A.Ş. v. Republic of Kazakhstan*; and *Attila Doğan Construction & Installation Co. Inc. v. Sultanate of Oman*.

¹⁰³This states that the Convention applies to the recognition and enforcement of arbitration judgments issued in the territory of another contracting State.

As to whether an arbitration judgment is domestic or foreign, the following criteria have been formulated in theory and case law (Çelikel, Nomer & Esen, 2010): a) the nationality of the parties; b) the place of arbitration (principle of territoriality); c) the nationality of the procedural rules applied to arbitration; and d) the combination of the principle of territoriality and the nationality of the procedural rules. Arbitral awards are mainly regulated under International Private and Procedural Code (IPPC) No. 5718 and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), which was ratified by Turkey on 02.07.1992 and came into force on 30.09.1992 (Kalpsüz, 2010). Arbitral awards granted in respect of the provisions of the Turkish International Arbitration Code (TCPC) are accepted as domestic arbitral awards: thus, they are binding and enforceable without a recognition and enforcement procedure. The New York Convention and the IPPC do not make a distinction between recognition and enforcement (Karton, 2013) in the procedure to be applied. Therefore, both recognition and enforcement procedure are subject to the same provisions with respect to the New York Convention and the IPPC (Berman, 2017).

The first historic decision of the Plenum of the Turkish Court of Cassation¹⁰⁴ in 1951 defined foreign arbitration judgments as those that were "enacted in a foreign legal order" (*yabancı bir kanun otoritesi altında verilmiş*). This therefore rejected the criterion of the nationality of the judge or the place where this was issued. According to that judgment, an arbitration judgment carries the nationality of the legal order under which the arbitration proceedings were conducted (Çelikel, Nomer & Esen, 2010).

However, in 1976, the 5th Political Section of the Turkish Court of Cassation considered the alienity of an arbitration decision solely on the basis of the place where the arbitration hearing and the issue involving the contested decision took place¹⁰⁵. Indeed, a few years later, in 1985, the Turkish Invalide Service gave an answer to this question, using the criterion of both procedural law and territoriality (Nomer, 2008, & Akinci, 2011)¹⁰⁶.

Today, following the introduction of the Turkish Code of Private International and Procedural Law, the criterion that prevails in case law is the nationality of procedural rules applied to arbitration. It has been argued by theory that this was also the will of the legislator, who mentions the procedural rules of arbitration in several points (cases e, f and h) of art. 63 of the Turkish Code of Private International and Procedural Law for the execution of foreign arbitration judgments (Nomer, 2008). It is therefore crucial that the process is applied whether it is chosen by the parties or is left to the discretion of the arbitrator (Çelikel, 2010). If the arbitration is conducted in accordance with Turkish law, the decision will therefore be classified as Turkish, whereas if the procedure applied is not provided for by Turkish law, it will be considered foreign (Kuru, 2016).

18. Termination and capacity to execute a decision

According to art. 60 par. 1 of the Turkish Code of Private International and Procedural Law, "foreign arbitration judgments which are either final and enforceable or binding on the parties may be executed". The second paragraph of the same article states that "(...) the execution of foreign arbitral judgments is requested by an application to the Court of First Instance of the place agreed by the parties in writing. In the absence of such an agreement between the parties, the Court of the place of residence in Turkey shall be responsible for the decision, if not the place where he has his habitual residence, and, failing that, the place where the asset is situated be the subject of enforcement (...)" (Nomer, 2013).

According to the first paragraph of art. 60, the basic requirement is that the foreign arbitration judgment must be

¹⁰⁴Y. HGK 07.11.1951, in *Tatbikatta Yargıtay Kararları*, 1952, pp. 890, as well as a subsequent decision that broadly uses the same reasoning: Y. 11. HD 28.12.1978, Kuru VI, 6158.

¹⁰⁵Y. 5. HD 10.03.1976, E. 1617/K. 1052, in *İlmi Ve Kazai İçtihatlar Dergisi*, 1977, pp. 5671.

¹⁰⁶Y. 11. HD 19.12.1985 E.7355/K.7099, which was considered to be Turkish the arbitration judgment, as the choice of the arbitrator and the secretary was made by the Chamber of Commerce of Paris; however, the old Turkish Code of Civil Procedure (*HUMK*) measures have been implemented, while the decision was issued on Turkish soil – facts that both refer to the judgment as Turkish.

final (*kesinleşmiş*) and enforceable (*icra kabiliyeti kazanmış*) or, alternatively, binding on the parties (*taraflar için bağlayıcı*). In principle, it is investigated whether this decision is judged to be final under the procedural rules followed in arbitration and whether it is enforceable under the same procedural law – in other words, whether that decision can be enforced in the State of origin (Nomer, 2008).

From this wording of the law, we find that if foreign arbitration law requires the court to ratify the arbitration decision in order to obtain enforceability or final judgment, such a ratification must in any case be preceded. It cannot therefore be filed directly with the Turkish court to be declared enforceable in Turkey without first being declared enforceable in the State of origin. Thus, the double *exequatur* phenomenon is spoken, but this cannot be avoided because the law explicitly requires the decision to have already been enforceable under the law of the State of origin (Çelikel, 2010).

However, if, for some reason, the judgment has not become final or enforceable, the law goes a step further by stipulating that it is sufficient to implement the decision in Turkey, and only the parties agree that it will bind them¹⁰⁷. This condition, which was set apart from the first, was introduced for the first time with the new Turkish Code of Private International and Procedural Law in an attempt by the legislator to facilitate the recognition of foreign arbitration decisions – in particular, to overcome the obstacle of double recognition. It is worth noting that Turkish Code of Private International and Procedural Law does not refer to the term of reciprocity with regard to foreign arbitration. On the contrary, art. 44 of the abrogated Turkish Code of Private International and Procedural Law of 1982 stipulated that the judge must determine whether there is a bilateral agreement on the mutual recognition and enforcement of arbitration judgments, or whether there is legal or *de facto* reciprocity with the State of origin of the arbitration judgment. This condition was correctly omitted in the new code, because the concept of reciprocity is inconsistent with the institution of arbitration (Çelikel, 2010).

The court of first instance is also a competent court for the declaration of enforceability of arbitration judgments. With regard to local jurisdiction, the parties involved are in principle given the option of choosing the city to which the court will be seized. If there is no such agreement, the choice of local court is the choice of the arbitrator, as provided for in hierarchical order: the place of his or her domicile or habitual residence, and in the absence of this, the place where his or her property is located, for which enforceability may be sought (Çelikel, 2010).

19. (follows) Content of an application and procedure

In line with articles 52 and 53, the content of an application to the court of first instance to execute a foreign arbitration judgment is defined in article 61¹⁰⁸. The application is therefore filed along with as many copies as the number of defendants involved in the application (Çelikel, 2010)¹⁰⁹ and together with: a) the original or a certified copy of the arbitration agreement or the document containing the arbitration clause; b) the original or a certified copy of the decision; c) a translation and certified true copies thereof under documents a) and b) (Reinmar, 2012). For the rest, the provisions of articles 55 (on performance and procedures), 56 (on the adoption of a decision) and 57 (on how to enforce and revoke a decision) apply *mutatis mutandis*. If, as we will see below, one of the grounds for refusal of an application for a declaration of enforceability referred to in article 62 is not met, the court will issue a judgment that is enforced within the country and is subject to legal remedies like any other decision of the Turkish court.

Meanwhile, in 2012 the Court of Cassation held that “it is worth emphasizing that, even if it is necessary to analyze

¹⁰⁷This alone is sufficient for the execution of the foreign arbitration judgment in Turkey, even if it has not become final and enforceable. With respect to this, see Y. HGK 09.06.1999 E.467/K.489, in Yargıtay Kararları Dergisi, 2000, pp. 185, with reference to the corresponding New York Convention of 1958.

¹⁰⁸Which distinction would become relevant in some cases in which the party is not always identified with the defendant – such as, for example, in a decision against a joint venture, the *res judicata* of which extends also to the partnership’s members.

¹⁰⁹Insofar as the recognition and enforcement of arbitration judgments are subject to the special procedure for simplified procedural rules (*basit yargılama usulü hükümleri*), the Turkish Code of Private International and Procedural Law: articles 61 and 55 par. 1 must all be regarded as inadmissible by the applicant together with the submission of the application to the Court of First Instance.

the merits of a case, in order to determine whether the award can be enforced, this examination must be limited to the determination of whether or not the award is against public policy, this may not be an examination of the merits of the case (...)"¹¹⁰.

20. (follows) Possible complaints

As with the recognition and enforcement of foreign judgments, the Turkish court of recognition or enforceability, respectively, does not have the right to investigate the substance of the judgment (Nomer, 2008). On the other hand, the only specific reasons why the competent court of first instance can reject a request are limited to article 62 par. 1 of Turkish Code of Private International and Procedural Law. The first three are dealt with by the court of its own motion, while the burden of proof for the other six is borne by the applicant (par. 2) (Graves, 2012)¹¹¹. The party that requests a referral to arbitration must demonstrate that there is a binding arbitration agreement between the parties, as a consequence of the principle that the burden of proof lies with the person making the claim (*actori incumbit probatio*).

The nine reasons for refusal referred to in article 62 are the following:

1) if an arbitration agreement has not been established or an arbitration clause has not been entered into the main contract. This provision refers to the self-evident condition of the existence of either a special arbitration agreement – that is, a written agreement whereby the parties agree to make one or more disputes between each other at the discretion of an arbitral tribunal – or a clause in a contract that defines a method for resolving the dispute to an arbitral tribunal (Demirkol, 2016). This plea is an expression of the provision of article 37 of the Turkish Constitution, according to which no one is unwittingly denied access to a natural judge (Yürük, 2003)¹¹². This provision includes not only cases in which there is an absence of an arbitration agreement from the outset, but also those in which a contract was concluded but is invalid and does not therefore have any legal consequences. An example of such a case is the conclusion of a contract for arbitration by a person who is not provided with the power of attorney, and it is assumed that in the absence of a valid declaration of will (explicit or implied) for the approval of the contract, also does not bind the principal and the dealer (Esen, 2003)¹¹³. Another issue that has been raised repeatedly with regard to the validity of arbitration agreements is the language that has been formulated, whether it is a void the relative contract drawn up in the Turkish language. The answer to case law was that because of the specificity of the arbitration agreement, the language in which it was drafted has no bearing on its validity, even if the place where it was drawn up was Turkey¹¹⁴;

2) if the arbitration judgment is contrary to public order or morality. As we have seen with regard to the execution of foreign judgments, the basic condition for the issue of the relevant court decision by the Turkish Court of First Instance is that the enforcement of the decision in Turkey does not contradict the country's public order. This condition also applies to the execution of foreign arbitration decisions, while to public order (*kamu düzeni*) is added morality (*genel ahlak*). It is worth noting that article 62 does not refer to "obvious opposition" to public order. The fact that this article does not explicitly mention "obvious" (*açıkça*) opposition should rather be attributed to the inadvertent omission of the legislator, which is probably due to the fact that the provisions of the New York Convention have been transposed into the law. In our opinion, therefore, in the case of arbitration decisions it would also be necessary to support the element of obvious contradiction in public order. Any other interpretation that would give the judge the discretion to dismiss requests for enforcement just because of a simple opposition to public order would be excessive and under no circumstances would a rigorous treatment of arbitrators be justified

¹¹⁰Court of Cassation General Assembly File No 2011/13-568 Decision No 2012/47, 08 February 2012.

¹¹¹See the first case in Turkish history of arbitral rejection: Osuuskunta METEX Andelslag V.S. v. Türkiye Elektrik Kurumu Genel Müdürlüğü General Directorate, Ankara, Court of Appeals, 15th Legal Division, 1 February 1996.

¹¹²Concerning article 71 of the Turkish Constitution.

¹¹³Plenary Civil Divisions of the Cassation Court (Y. HGK) 11.10.2000 E.1122/K.1256, in İlmi Ve Kazai İçtihatlar Dergisi, 2009, pp. 1079; as well as Y. 19. HD 11.03.2004 E.2654/K.2603 (Kazancı Hukuk Otomasyonu).

¹¹⁴See, Y. 11. HD 07.10.1986, in Yargıtay Kararları Dergisi, 1987, pp. 66 in particular: because of its specificity as a "procedural contract" (*usul kukuku sözleşmesi*), the arbitration agreement does not fall within the scope of the Law on the Compulsory Use of the Turkish Language in Commercial Enterprises of 1926.

in relation to foreign judgments (Nomer, 2008)¹¹⁵. In the paragraph relating to foreign court judgments, reference has been made to exemplary cases that have been found to be contrary to the Turkish public order. However, there are also special cases relating to arbitration that have been considered to be in opposition to Turkish public order and that are worth mentioning. This has applied to foreign arbitration decisions issued under an arbitration clause or arbitration agreement drawn up by both parties on account of the exploitation of their economic superiority towards the other party (Nomer, 2008). A term that gives the choice of arbitrators exclusively in one place is also considered contrary to public order. These terms in an arbitration clause or agreement are deemed contrary to Turkish morality, so any such arbitration must be excluded¹¹⁶. It should also be noted that if the validity of the alleged arbitration agreement is governed by Turkish law, any contradictions in the contract or arbitration clause in morality are rejected as reasons for the refusal of enforceability (case a) and b) of article 62 par. 1). In our opinion, this is because a question is also raised as to the validity of the contract or the clause, since under Turkish law contracts contrary to public order or morality are completely invalid. If the opposition concerns part of them, then the nullity relates only to these provisions, unless it is obvious that without them the contract would not be drawn¹¹⁷. Also noteworthy is a historical decision¹¹⁸ of the 1976 Turkish Court of Cassation, which considered that the order of the International Chamber of Commerce (ICC) rules of arbitration requiring a draft decision to be submitted to the International Court of Arbitration before final adoption was contrary to the Turkish public order as a violation of the principle of arbitrators' independence (Çelikel, 2010). This decision divided the scientific world, with its supporters arguing that the possibility for the court to propose amendments to the draft decision, *inter alia*, as to the applicable law of the reasoning of the decision¹¹⁹, was a clear violation of the arbitrator's independence (Üstündag, 1971). However, its critics point to both the fact that the court does not enter the substance of the case, expressing its observations only in legal matters (Nomer, 2008). They also refer to the fact that the parties are *a priori* aware of the court's participation in the arbitration proceedings in accordance with the relevant rules of the ICC and therefore do not doubt the independence of the arbitrators (Çelikel, 2010), as this interference by the court provides more security to the parties and works to the benefit of arbitration (Kalpsüz, 1978);

3) if the dispute that is the subject of the arbitration judgment cannot be resolved through arbitration under Turkish law. This case refers to disputes that cannot by law be resolved by arbitration. It is a mandatory provision that restricts parties' freedom to make certain disputes in arbitration. Thus, according to Turkish law¹²⁰, disputes concerning real rights in immovable property¹²¹ and the expulsion of the lessee cannot be subject to arbitration, disputes arising from horizontal and vertical co-ownership, as a rule disputes of voluntary jurisdiction, affinity issues and divorce (Ruhi & Kaplan, 2002)¹²², as well as disputes relating to forced execution and bankruptcy (Nomer, 2008);

4) if one of the parties was not lawfully represented before the arbitrator and the actions taken were not expressly approved *ex post*;

5) if the party against whom enforcement is sought has not been legally informed of the choice of the arbitrator or has been deprived of the possibility of submitting allegations and defence. In such a case, the person against whom enforcement of the foreign judgment is to be served should not have been deprived of the right to participate in the trial, showing their claims and defence. The court must therefore examine whether the defendant was informed

¹¹⁵Constitutional Court (AYM) 02.12.2004, in Resmî Gazete 21.10.2005, 25973, which refers to devices that are at a disadvantage on one side, thus compromising the proper procedural balance (*hakkaniyete uygun bir denge*) between the two parties.

¹¹⁶Y. 13. HD 25.04.1991, in Yargıtay Kararları Dergisi, 1991, pp. 1222-1225.

¹¹⁷Article 27 of the new Turkish Code of Complaints (*Borçlar Kanunu*) of 04.02.2011. As regards, in particular, the arbitration clause, it would be difficult to accept that the parties would not proceed to the conclusion of the contract without this clause, and it is therefore more appropriate, in our opinion, that the nullity be limited only to the clause and not to the main contract as a whole.

¹¹⁸Y. 15. HD 10.3.1976, in İlmî Ve Kazai İçtihatlar Dergisi, 1977, pp. 567, with some dissenting opinions too.

¹¹⁹See article 22 of the ICC Rules of Arbitration.

¹²⁰See articles 408 of the Turkish Code of Civil Procedure (*HMK*) (former 518 of the old Turkish Code of Civil Procedure (*HUMK*)) and 1 of the Turkish Code of Civil Law (*MTK*), as well as the relevant case law.

¹²¹Y. 13. HD 25.04.1991, in Yargıtay Kararları Dergisi, 1991, pp. 1222, which also raised a question relating to public order opposition.

¹²²See Y. 2 HD, 13.04.1995 E.3612/K.4567, which rejects the application for divorce issued by the City of Copenhagen on the grounds that it was not a Court decision, and that states in its reasoning that even if it wanted to be considered as an arbitration judgment, it cannot be recognised again because the divorce may not be subject to arbitration under Turkish law.

in good time of the arbitration and whether he or she had the time to prepare for it, collect and produce evidence¹²³ and examine the documents involved in the case to be able to respond to them. The law according to which the degree of violation of one party's rights of defence is judged is the one agreed to govern the arbitration procedure (Nomer, 2008). It is further worth noting that, in particular, a violation of the obligation to inform the other party in due time and the defendant's impediment to the submission of allegations (*savunma hakkı*) may also be regarded as constituting an opposition to the Turkish public order in case b) of article 62 (Nomer, 2008);

6) if the arbitration judgment is invalid under the law chosen by the parties to govern the arbitration agreement or clause, or if there has been no agreement on this matter under the law of the State in which the decision was taken. The foreign arbitration judgment to be enforced should not be invalid (*hükümsüz*), in accordance with the applicable law specifically chosen by the parties to the contract or the arbitration clause. Where the text of the arbitration agreement or the main contract to which the clause has been issued states that the laws or the relevant provisions of the law are applicable, it has been held in case law that this provision includes the provisions of both substantive and procedural law (Nomer, 1998)¹²⁴. Conversely, if the contract or arbitration clause does not explicitly state the applicable law, then the validity of the judgment should be determined in accordance with the law of the location where the arbitration judgment was made;

7) if the choice of arbitrators or the arbitration rules applied by the arbitrators are contrary to the parties' agreement, in the absence of such an agreement if they are contrary to the law of the State in which the judgment was given. This condition concerns the legality of the choice of the arbitrator or the rules of arbitration that have been applied and that must have been made within the parties' agreement to bring the dispute to arbitration, in the absence of such agreement. A choice must be taken in accordance with the law of the country where the decision was made. With regard to the selection of arbitrators, it has been judged by jurisprudence that the choice of arbitrator by one party, even if it was expressly agreed that this would be done by common agreement between the parties, is valid if a reasonable period has elapsed after one party presented an invitation to the other for the selection of arbitrators and the latter did not respond¹²⁵. With regard to the rules of procedure, in our opinion the position of the Turkish Court of Cassation was right that the choice of parties to define the law of a State as applicable, without specifying further, includes both the substantive and procedural law of arbitration. It follows that a foreign decision that applied the arbitration rules of the State in which it was issued, despite the parties generally opting for Turkish law, constitutes a breach of the agreement with regard to the procedural rules applied and thus hinders its execution (Ekşi, 2007)¹²⁶;

8) if the arbitration judgment concerns an issue that was not included in the contract or the arbitration clause, or if it exceeded the conditions specified in the contract or clause and only in that part. This case concerns decisions in which the arbitral tribunal has decided on matters that were not included in the contract or arbitration clause. Exceeding jurisdiction to rule on a dispute provided under the arbitration agreement is generally a breach of the obligations under that agreement. As such, was the choice of the foreign arbitral tribunal to apply to the dispute in addition to the agreed law and provisions of the law of a third country that, in the opinion of the court, was appropriate in view of the dispute;

9) if the arbitration judgment has not become enforceable or binding under either the law of which it was a subject or the law of the State in which it was issued or the arbitration rules applied or annulled by the competent authority of the State in which it was issued. The last case referred to in article 62 concerns the assistance of the elements of final judgment and enforceability or the binding nature of the arbitration judgment. Such information will suffice either in accordance with the law to which it was subject or under the law of the State in which it was issued, or in accordance with the arbitration rules applied. If, therefore, there is finality and enforceability or binding of the decision in accordance with one of the alternatively mentioned laws, this is sufficient to reject the defendant's plea (Ansay & Wallace, 2011). For other issues regarding the content of final judgment and enforceability, apply what has already been cited above.

¹²³It has been held, however, that a decision rejecting a written testimony following an assessment that it is not an admissible means of proof does not constitute a breach of the party's right to a fair hearing. Y. 19. HD 09.11.2000, E.7171/K.7602, in Yargıtay Kararları Dergisi, 2001, pp. 1057ss.

¹²⁴See: Plenary Civil Divisions of Cassation Court (Y. HGK) 05.05.1993 E.235/K. 273 and Y. 15. HD 25.12.1997, E.4213/K.5603 (*Kazancı Hukuk Otomasyonu*).

¹²⁵Plenary Civil Divisions of Cassation Court (Y. HGK) 19.03.2003 E.42/K.182 (*Kazancı Hukuk Otomasyonu*).

¹²⁶Plenary Civil Divisions of Cassation Court (Y. HGK) 05.05.1999 E.235/K.273.

In accordance with this provision, an appeal may also be lodged as a plea, annulment or revocation of the arbitration judgment by a competent foreign body, given that after its disappearance it is logical that it no longer has a legal effect and therefore cannot be enforced in Turkey (Nomer, 2008).

21. Main differences between the Turkish Code of Private International and Procedural Law and the New York Convention

Finally, in contrast with the 1958 New York Convention, the Turkish Code of Private International and Procedural Law does not contain any specific provisions on the law applicable to the question of the validity of the arbitration agreement or the ability of the parties to prepare it¹²⁷. Thus, the applicable law in these matters is sought in accordance with articles 9 and 24 of the Turkish Code of Private International and Procedural Law on legal capacity¹²⁸ (*ehliyet*) and contractual obligations¹²⁹ (*sözleşmeden doğan borç ilişkilerinde*) respectively.

Another major difference between this Convention and Code concerns the burden of proof (Şanlı, 1994). According to the Convention, if one of the conditions for the execution of a foreign judgment is not fulfilled, the burden of proof in the cases referred to in article 5 par. 1 lies with the person claiming to be absent for the remainder referred to in paragraph 2 of that article, and the court is seized of its own motion. In contrast, the Turkish Code of Private International and Procedural Law states, as we have seen, that the first three cases (a, b and c) of article 62 are dealt with by the court of its own motion, while for the remaining six (ç, d, e, f, g and h) the proof is borne by the applicant.

Finally, with regard to the "maturity" of foreign arbitration decisions, the Convention stipulates that the decision should be binding on the parties (article 5, par. 1-e), whereas the Turkish Code of Private International and Procedural Law, as we have seen, applies alternative criteria to final judgments and their enforceability abroad or their binding nature on the parties (Nomer, 2008).

Concluding remarks

After examining the provisions of Turkish private international law on the recognition and enforcement of foreign judgments, we can come to a first conclusion that Turkish law is generally little different from that of European states. As case law shows, current legal status in the country represents an achievement with regard to the development and maturation of Turkish legal science in the neighbouring country, something that has largely taken place over the past 10 to 20 years. Indeed, what might be noted in particular is that Turkish case law has often been sceptical about the recognition of certain judgments and it is difficult to accept cases in which a foreign court provided a solution that was unknown to Turkish law but not unreasonable with respect to the conscience of law. However, the dialogue of theory and jurisprudence, as well as legislative reforms in almost all the codes with which Turkey proceeded in view of its European perspective, had a direct impact on the decisions of the Turkish courts. The ongoing reforms, as reflected both at a legislative and judiciary level, are rapidly evolving in the Turkish legal system, with the ultimate goal of full adaptation to European legislation – which is, moreover, a prerequisite for the country's accession to the EU. If and when this happens, it will have a direct impact on applicable Turkish international law with respect to the other European states through application of most of the European regulations. That would make the present study more historical rather than practical.

¹²⁷See article 5 par. 1 a) of the Convention, which states that the Court of Justice shall examine "(...) whether the parties had an incapacity under the applicable law or whether the agreement is invalid under the law to which the parties have been subjected, and in the absence of such indication, under the law of the country in which the decision was issued (...)".

¹²⁸This article defines in principle the law of the person's nationality (par. 1).

¹²⁹Which lays down as the applicable law what the parties have explicitly chosen (par. 1), and in the absence thereof, the law with which it is more closely connected with the contract (par. 4), with the elements constituting this close relationship.

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